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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 15.

BURNS POE, COLLECTOR OF INTERNAL REVENUE, FOR THE DISTRICT OF WASHINGTON,

v.

H. G. SEABORN.

No. 84.

GEO. C. HOPKINS, COLLECTOR OF INTERNAL REVENUE,

v.

C. W. BACON.

No. 86

JACOB O. BENDER, COLLECTOR OF INTERNAL REVENUE

v.

WILLIAM PFAFF.

No. 106.

FRED O. GOODELL, COLLECTOR OF INTERNAL REVENUE

v.

I. B. KOCH.

JOINT AND SUPPLEMENTAL BRIEF FOR TAXPAYERS ON CERTAIN QUESTIONS COMMON TO ALL OF THE ABOVE CASES.

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JOINT AND SUPPLEMENTAL BRIEF FOR TAXPAYERS ON CERTAIN QUESTIONS COMMON TO ALL OF THE ABOVE CASES.

FOREWORD.

This brief covers certain questions common to all four of the above styled separate actions which are contemporaneously before this Court and is sub-

mitted to reduce repetition of the subject matter in the presentation of the respective cases. The first case in the title, *Burns Poe, Collector, v. Seaborn,* involves the question as to whether or not a married man citizen of the State of Washington is required under the Revenue Act of 1926 to return all community income acquired by him and his wife under the system of community laws in that State, as his income and to pay taxes upon it accordingly. Stated conversely, the question is whether or not the interest of a married woman under the laws of Washington in community income is such as to entitle her to return her share of it as her income and pay taxes upon it accordingly. Each of the other cases involve the identical question as applied, respectively, to the laws of the States of Louisiana, Texas and Arizona.

In each case a brief is being presented to the Court upon the law of the state involved. In each state as a result of opinions of the Attorneys General of the United States and regulations of the Treasury Department, husbands and wives have been making separate returns of their respective shares of community income since 1920. The Department never recognized the right of husbands and wives to make separate returns in California, and this practice has never been in force as to taxpayers in California. After the decision of the Supreme Court in the case of *United States vs. Robbins, et al.,* 269 U. S. 315 (decided January 4th, 1926), with reference to the taxation of community income in California, the Honorable William D. Mitchell, Acting Attorney General, under date of July 16th, 1927, (35 Op. Attys. Gen. 265) after expressing his opinion that the question involved in that case and in the other

states was whether a share of the community income *belonged* to the wife and that this was a matter upon which state statutes and the decisions of the state courts must control, advised the Secretary of the Treasury that while the proper answer to the questions presented might be more evident as to some of the states than as to others, the answers to the questions involved were not so obvious as to make it clear what conclusions the courts might reach with respect to the laws of community property states other than California, and he, therefore, formally withdrew the prior opinions in order to leave the Secretary of the Treasury free to arrange for test cases in the courts or otherwise deal with the matter as might be thought proper. The practice of separate returns, however, has not been changed in any state.

Following this opinion of the Acting Attorney General, the above cases were instituted as test cases in each of the respective states. Upon the trial of each of these cases, contention was made by the Government for the first time that the Revenue Act should be construed as taxing the income to the spouse having control of the receipt and disposition thereof (irrespective of any question of ownership), thus necessarily involving the interpretation of Federal law with respect to taxation. Since this question is common to all four cases and since all of the cases are to be submitted to the Court upon the same date, counsel have deemed that it might be helpful to the Court to consider a joint brief upon these questions. Some of the points covered by this brief are discussed in each of the separate briefs, but not in as much detail as they are here treated and the

parties respectfully request the Court to consider this as a supplemental brief in each of the four cases.

For the purpose of the argument that is to follow in this brief we assume, as we think has been clearly shown in the respective briefs for taxpayers, that under the statutes and decisions of each of the States in question the wife has a vested one half ownership in all income, which under the law of such State becomes community property simultaneously with its receipt.

OUTLINE OF POINTS COVERED HEREIN.

POINT I.

THE LANGUAGE AND TERMS OF THE REVENUE ACT OF 1926, AND PREVIOUS ACTS, CLEARLY AUTHORIZE THE FILING OF SEPARATE RETURNS OF COMMUNITY INCOME BY HUSBAND AND WIFE, AND CANNOT AS A MATTER OF INDEPENDENT STATUTORY CONSTRUCTION, BE INTERPRETED AS TAXING THE HUSBAND IN COMMUNITY PROPERTY STATES ON THE HALF OF THE COMMUNITY INCOME WHICH ADMITTEDLY BELONGS TO AND IS OWNED BY THE WIFE.

(a) **The Statute Taxes the Income of Each Individual, and Husbands and Wives, as Individuals, are Authorized and Permitted by the Express Terms of the Revenue Act of 1926 to Make Separate Returns and Include in Such Separate Returns the Income of Each Spouse.**

(b) **The Community Partnership or Marital Community Does Not Come Within the Meaning and Classification of Trusts, as Described in the Revenue Act of 1926.**

(c) **The "Community Partnership" Should be Classified Under the General Heading of "Partnerships," and the Revenue Act Expressly Provides That Each Partner Shall Report in His Individual and Separate Income Tax Return, His or Her Share of the Partnership Income.**

(d) There is Nothing in the Language of the Revenue Act of 1926, or Prior Acts, Expressly or Impliedly Indicating an Intent on the Part of Congress to Tax an Individual or Husband on Income Belonging to Another Person on the Theory of Administration and Control Over the Property and Income Exercised by the Individual Citizen or Husband Sought to be Taxed.

(e) Statutes Are to be Construed in Favor of Taxpayers

(f) The Question as to What Is Property or Income and to Whom It Belongs Is a Matter to be Determined by the Local State Law and Decisions

POINT II.

THE UNIFORM AND LONG CONTINUED EXECUTIVE CONSTRUCTION RECOGNIZING THE RIGHT OF HUSBAND AND WIFE IN ALL COMMUNITY PROPERTY STATES, EXCEPT CALIFORNIA, TO REPORT SEPARATELY THE SHARE OF COMMUNITY INCOME OWNED BY EACH, TOGETHER WITH THE REPEATED REFUSAL OF CONGRESS TO AMEND THE LAW SO AS TO AVOID SUCH CONSTRUCTION AND THE RE-ENACTMENT BY CONGRESS, WITHOUT CHANGE, OF THE PROVISIONS OF THE REVENUE ACT, WHICH HAD RECEIVED SUCH A LONG CONTINUED AND UNIFORM EXECUTIVE CONSTRUCTION, CONSTITUTE A DEPARTMENTAL AND LEGISLATIVE HISTORY CONCLUSIVELY DEMONSTRATING THAT THERE

WAS NO INTENTION IN THE REVENUE ACT OF 1926 TO TAX HUSBANDS ON THE HALF OF THE COMMUNITY PARTNERSHIP INCOME BELONGING TO THEIR WIVES.

The Executive Construction and Legislative History of the Various Revenue Acts Recognize and Affirm the Right of Husbands and Wives to Report in Separate Returns their Respective Shares of the Community Partnership Income.

Congress has twice rejected Amendments, once in 1921 and again in 1924, Expressly Designed to Tax Husbands in Community Property States on the Community Income, subject to their Administration and Control.

This Court has Repeatedly Held That in the Interpretion of a Doubtful or Ambiguous Statute a Uniform Executive Construction and Administrative Practice will be Given Great Weight, and that the Re-enactment of a Statute in the Same Language which has Previously Received a Long and Uniform Executive Construction Amounts to an Adoption of the Executive Construction by Congress.

The Government's Contention that "Control" and not "Ownership" is the Test of Income Taxation Under the Revenue Act of 1296 Is Inconsistent with and Contrary to the Last Opinion on this Subject Rendered by Then Acting Attorney General William D. Mitchell, on July 16, 1927 (after the Robbins Case Dealing with the California Law was Decided) in which Opinion it was Ruled that

the Revenue Act of 1926 Intends to Tax a Husband and Wife on the Income of Each to be Determined by the Statutes and Decisions of Each State.

POINT III.

THE DECISION OF THE SUPREME COURT IN THE CASE OF *UNITED STATES v. ROBBINS*, INVOLVING THE LAW OF CALIFORNIA, IS NOT APPLICABLE TO THE LAWS OF OTHER COMMUNITY PROPERTY STATES AND DOES NOT SUPPORT THE GOVERNMENT'S CONTENTION THAT CONGRESS INTENDED TO TAX ALL COMMUNITY INCOME IN OTHER STATES TO THE SPOUSE HAVING CONTROL OF THE RECEIPT AND ADMINISTRATION AND DISPOSITION THEREOF.

(a) The Robbins Case Deals only with the Local Law of California, and the Underlying Theory of the Decision is that under the Decisions and the Statutes of California, the Husband is in Law the Owner of All of the Community Property and Income, and Possesses All of the Substantial Attributes of Ownership.

(b) The Reasons Presented in Support of the Conclusions Reached in the Last Paragrah of the Robbins case are at Most Reasons and Arguments Why Congress had the Power to and, as Matter of Legislative Policy SHOULD Tax Husbands in States having Community Laws Similar to California on the Entire Community Income, including the Portion of the Community Income in

Which the Wife Has Only an Expectant Interest Similar to her Interest in California; and do not Show That Congress Actually INTENDED to Use or Actually Did Use Language Taxing Husbands in Other States on the Portion of the Community Income in Which Under the Local Law, the Wife has a Present and Substantial Ownership at the Time it Accrues.

POINT IV.

THE DECISIONS IN CORLISS V. BOWERS AND LUCAS V. EARL, CITED IN THE GOVERNMENT'S BRIEF, ARE NOT APPLICABLE TO THE ISSUES INVOLVED IN THESE CASES.

POINT V.

THE CONTENTION OF APPELLANT THAT THE REVENUE ACTS IMPOSE INCOME TAX UPON ONE INDIVIDUAL AS AN INCIDENT TO HIS CONTROL OF THE INCOME VESTED IN ANOTHER INDIVIDUAL UNDER THE APPLICABLE LAWS OF THE STATES, MUST BE REJECTED BECAUSE SUCH CONSTRUCTION WOULD RENDER THE STATUTE UNCONSTITUTIONAL, IN THAT

(a) It Would Be in Part a Direct Tax, Not Based on Income of the Person Taxed and Not Apportioned.

(b) It Would Result in a Tax Not Geographically Equal and Uniform.

(c) Such a Basis Would Be so Arbitrary and Capricious as to Constitute Taking of the Property Without Due Process.

ARGUMENT.

POINT I.

THE LANGUAGE AND TERMS OF THE REVENUE ACT OF 1926, AND PREVIOUS ACTS, CLEARLY AUTHORIZE THE FILING OF SEPARATE RETURNS OF COMMUNITY INCOME BY HUSBAND AND WIFE, AND CANNOT, AS A MATTER OF INDEPENDENT STATUTORY CONSTRUCTION, BE INTERPRETED AS TAXING THE HUSBAND IN COMMUNITY PROPERTY STATES ON THE HALF OF THE COMMUNITY INCOME WHICH ADMITTEDLY BELONGS TO AND IS OWNED BY THE WIFE.

(a) The Statute Taxes the Income of Each Individual, and Husbands and Wives, as Individuals, are Authorized and Permitted by the Express Terms of the Revenue Act of 1926 to Make Separate Returns and Include in Such Separate Returns the Income of Each Spouse.

Each of the statutes levying income taxes undertakes to tax the net income of each individual citizen of the United States. The Act of 1913 assessed a tax "upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States." Through all of the succeeding Acts down to and including the Act of 1926, the language employed has in substantially the same terms levied a tax upon the net income of each *individual* however acquired.

The Revenue Act of 1926, under the heading of

"INDIVIDUALS" and under the heading of "INDIVIDUAL RETURNS", contains the following pertinent sections:

"INDIVIDUALS.

Normal Tax.

SEC. 210 (a) In lieu of the tax imposed by Section 210 of the Revenue Act of 1924, there shall be levied, collected and paid for each taxable year *upon the net income of every individual* (except as provided in subdivision (b) of this section) a normal tax of 5 per centum of the amount of the net income in excess of the credits provided in section 216, etc.

Surtax.

SEC. 211. (a) In lieu of the tax imposed by section 211 of the Revenue Act of 1924, but in addition to the normal tax imposed by section 210 of this Act, there shall be levied, collected, and paid for each taxable year *upon the net income of every individual* a surtax as follows: etc.

Individual Returns.

SEC. 223. (a) *The following individuals shall each* make under oath a return stating specifically the items of *his gross income* and the deductions and credits allowed under this title—(1) Every individual having a net income for the taxable year of $1,500 or over, if single, or if married and not living with husband or wife; (2) Every individual having a net income for the taxable year of $3,500 or over, if married and living with husband or wife; and (3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

SEC. 223. (b) *If a husband and wife living together* have an aggregate net income for the tax-

able year of $3,500 or over, or an aggregate gross income for such year of $5,000 or over—(1) *Each shall make such a return, or* (2) *The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.*

Sec. 216. (c) A husband and wife living together, shall receive but one personal exemption. The amount of such personal exemption shall be $3,500. *If such husband and wife make separate returns, the personal exemption may be taken by either or divided between them.*" (Italics throughout above quotations ours)

The above sections of the Revenue Act, it is to be noted, give to husbands and wives a right to elect to file separate returns or a single joint return, and plainly state that the *income of each* may be included in separate returns or consolidated in a single return. Where separate returns are filed the Revenue Act does not permit the calculation of their tax liability "on the aggregate income." This construction of the Statute, clear upon its face, has been approved expressly or tacitly by every Attorney General who has considered the point (See Opinions of Attorney Generals Palmer, Daugherty, Stone and Mitchell cited *infra*). In Louisiana, Texas, Arizona and Washington community income has been divided between husband and wife in their Income Tax Returns on the basis of joint ownership, for many years, in accordance with the Rules and Regulations of the Internal Revenue Department specifically established in accordance with an opinion rendered by the Attorney General of the United States. This was the procedure followed by the plaintiff and his wife in each of the cases before the Court.

The statute we have quoted pertinent to this discussion employs the same language as the preceding Revenue Acts of 1921 and 1924.

(b) The Community Partnership or Marital Community Does Not Come Within the Meaning and Classification of Trusts, as Described in the Revenue Act of 1926.

The marital partnership or community cannot by any stretch of the imagination be held to come within the meaning and description of *Trusts*, as defined and described in the Revenue Act of 1926. (Section 219a). The legal history of the community partnership and its attributes and relationships are *sui generis* and have never been described or defined by either the civil or common law jurisprudence and text book writers as *Trusts*, as known to and defined by the common law. It is not even contended in the government's brief that the community partnership is a *Trust* within the meaning of the Revenue Act of 1926. It is suggested, inferentially, however, in the government's brief that the husband as manager of the community partnership is analagous to a trustee and that trustees are required, under certain circumstances, to pay an income tax on the trust property under their control. The analogy suggested, upon analysis, is clearly fallacious and, as a matter of fact, is in favor of the taxpayer in this case rather than the contention of the government. It is to be particularly noted that a trustee under certain circumstances is merely required to make a separate return for and pay the tax on the income of the trust estate which belongs to the beneficiary and which is under the control of the

trustee. The income tax paid is paid out of the funds of the trust estate and not by the trustee personally. Furthermore, the trustee is not required to add to his *individual income* the *income of the trust estate under his administration for the purpose of calculating the surtax*, which is the principle the government is contending should be applied to the husband in the case of community partnership income. The trustee makes a separate return as an individual, in which is included his personal income, and makes a separate return as trustee for the trust estate, in which is included the income from the property belonging to the beneficiary which is under his control. Even if we assume, for the purpose of argument, that the husband, as managing partner of the community partnership can be analogized to a trustee (which inference, as we have shown, is not justified as a matter of statutory construction), the husband, nevertheless, would be required, under the plain language of the Revenue Act, to make a separate return as trustee of the community income, and another separate return of his individual and separate income, if he possessed any. The *Robbins* case, relied on by the government, clearly holds, on the contrary, that the husband must include in his individual separate return the half of the community income which it was claimed in that case belonged to the wife, and that such community income must be added to his income for the purpose of computing his individual surtax. The reason why the so-called share of the community income of the wife was required to be included in the husband's return in the *Robbins* case, was because the court decided, not that the husband was a trustee, but that all of the in-

come was actually owned by and belonged to the husband, which was the real point at issue in the case.

(c) The "Community Partnership" Should be Classified Under the General Heading of "Partnerships," and the Revenue Act Expressly Provides That Each Partner Shall Report in His Individual and Separate Income Tax Return, His or Her Share of the Partnership Income.

Section 218(a) of the Revenue Act of 1926, under the heading "PARTNERSHIPS", provides that:

> "Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, etc."

The Community or Marital Partnership, inherited from the Spanish and French Laws, is certainly more closely analogous to Partnerships, as they are known to and defined by the common law, than to Trusts or any other common law status or legal relationship. Generally the husband in Community Property States is the *Managing Partner* of the *Community Partnership*, with liberal powers of administration so long as he acts in good faith and the partnership is not dissolved or liquidated for the reasons provided by law. (In certain states, under statutory authority, the wife is managing partner as to a portion of the community property and may under certain circumstances become the managing partner as to all of such property). If the Marital Community or Partnership is to be con-

sidered as having been expressly included or referred to by analogy at all in the Revenue Act of 1926, it is submitted that logically and substantially it is described under the general heading of *Partnerships* quoted above, because the Community Partnerships is more similar in all of its legal and practical attributes and characteristics to Partnerships than to *Trusts* as known to the common law.

If the Marital Partnership is analogized to partnerships as described in the Revenue Act of 1926, then the Revenue Act does not require the making of a return and the payment of an income tax by the managing partner based on the entire partnership income, but, on the contrary, each partner is permitted to report his share of the partnership income in his *individual return.* The husband and wife composing a community partnership, as the plaintiff and his wife in each of the instant cases, would each report in *separate returns his or her half* of the community property income, in accordance with the express terms of the Revenue Act as hereinabove quoted.

It is clear from what has already been said that the original Revenue Act and all subsequent revisions of the law down to and including the Revenue Act of 1926, have been eloquently silent insofar as Marital Partnerships or the Community Property system are concerned. Although we have seen that *Trusts, Corporations* and *Associations,* as known to the common law, are defined and classified, and are given separate treatment, for purposes of taxation, in the Revenue Act of 1926, there is no mention of the *Community Partnership* in the Income Tax Law, or any reference to the husband's duty as managing partner, agent or trustee, to make a return for the wife's share of Com-

munity Income, and above all there is no suggestion in the law of the astounding proposition that the husband should add to his own personal income the share of the wife in the Marital Partnership income which has never vested in the husband and admittedly belongs to the wife, according to the fundamental laws of the states here involved.

The only heading and sections of the Revenue Act, therefore, under which the wife's half interest in the community can be reported are the sections already referred to and quoted from (Sections 223 (a), (b), 210 & 211) expressly permitting husbands and wives to each report in separate returns the *income of each*, and accordingly the wife's half interest in the Community Partnership Property income is reported in her return as her income, and the husband's half interest is reported as his income in his individual separate return. This is the exact procedure that was adopted by the plaintiff and his wife in each of the cases now before the court.

(d) There is Nothing in the Language of the Revenue Act of 1926, or Prior Acts, Expressly or Impliedly Indicating an Intent on the Part of Congress to Tax an Individual or Husband on Income Belonging to Another Person on the Theory of Administration and Control Over the Property and Income Exercised by the Individual Citizen or Husband Sought to be Taxed.

The government contends that the last paragraph of the *Robbins* case indicates that the Revenue Act is to be construed as not only taxing an individual on his own property and income, but, in addition, on the income and property belonging to others, over which

he exercises certain attributes of control and management.

There is nothing in the language of the Revenue Act which either expressly or impliedly indicates an intention to tax individuals or husbands on income admittedly owned by another person on the basis of the control and dominion over the property and income exercised by the person or husband sought to be taxed. We have already shown under previous headings of this brief that the Act plainly indicates that it intends to tax *individuals* on the income belonging to the *individuals.* By the language of the Act it is the net income "of" an individual which is taxed, not net income "controlled by" an individual. The Act treats husbands and wives as individuals and states that husbands and wives are to be *separately taxed,* if they so elect, on the *income of each.*

To say that the Act contemplates the taxing of an individual on income that does not belong to him, because he has certain elements of control and dominion as an agent in the administration of the property, would by analogy justify the argument that the Act contemplates that a *managing partner* of an *ordinary partnership* must add to his separate individual income the income of the entire partnership, even though other partners are owners of a substantial part of the income, for the purpose of calculating his individual income tax, because as managing partner he possesses and exercises certain attributes of control and dominion. It could also be argued with equal plausibility that in the case of a *trust,* especially a *spendthrift trust,* where the trustee has liberal powers of administration and control and the beneficiaries are correspondingly restricted, the trustee should *add*

to his *individual separate income the income from the trust administered by him, for the purpose of calculating his income tax, because of the dominion and control exercised by the trustee with respect to the spendthrift trust estate.*

The answer to all of these suggestions and analogies is that the plain language of the Revenue Act expressly provides to the contrary. *Trustees* are authorized and required to make separate returns as *individuals* and as *Trustees* for the *Trust Estates* under their administration and control; and each partner, under the provisions of the Revenue Act, makes an individual return of his share of the partnership income, irrespective of any question of relative dominion or control. The husband has no more complete control in a Marital Partnership than a managing partner of an ordinary partnership where the contract of partnership vests liberal powers of control and administration in the managing partner. There is not a word or section in the present Revenue Act, or any previous Revenue Act, which (even remotely) implies that Congress intended not only to tax individuals on their *own* income, but also on the income of others where the individuals in question were *agents or administrators possessing and exercising elements of control and dominion over the income actually vested in and owned by others.*

The assertion by counsel for the Government that the test is administration or control, instead of ownership, has no support whatever in the language of the Act. One can search in vain for any language or implication which even faintly suggests the compulsory grouping of the husband and wife as the *target* of a single tax, or which requires a tax levy to be made

upon their joint incomes. The basic idea of an individual income tax is that persons owning individual incomes shall contribute to the support of the government on the basis of the income owned. The burden is imposed upon those who have prospered financially and the rate is fixed by the amount of the taxpayer's prosperity. The tax is imposed upon "gain", "profit," "income," but only upon the gain, profit and income of the individual taxed. The essential element is ownership, and ownership is fundamental in any conception of gain, profit or income.

We will show, later on in this brief, that in 1921 and again in 1924, amendments to the Revenue Acts were proposed in Congress at the instance of the Treasury Department, purporting in plain language to tax the husband on the income from the community partnership *because of his control and administration.* These amendments were rejected by Congress as a matter of equity and fairness to the community property states, and such action clearly indicates the intention of Congress not to tax the husband on the income from the wife's half of the community partnership property, in community property states. In other words, Congress has twice repudiated attempts by the Internal Revenue Department to write into the Revenue Act language designed to bring about the result which the Government is now contending can be inferred from the Act without such express language.

(e) Statutes Are to be Construed in Favor of Taxpayers

It is a well settled and fundamental principle that statutes relating to taxes will not be construed so as

to levy taxes by implication. The taxpayer is entitled to the benefit of all ambiguities and uncertainties in the matter of interpretation of statutes which would have the effect of levying additional taxes upon such taxpayer. This principle has become elementary. See *Gould vs. Gould,* 245 U. S. 151:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen. *United States v. Wigglesworth,* 2 Story 369, Fed. Cas. No. 16,690; *American Net & Twine Co. v. Worthington,* 141 U. S. 468, 474, 35 L. Ed. 821, 824, 12 Sup. Ct. Rep. 55; *Benziger v. United States* 192 U. S. 38, 55, 48 L. Ed. 331, 338, 24 Sup. Ct. Rep. 189."

The Revenue Act of 1926 and previous acts are clear and unambiguous as we have pointed out. If, for the purpose of this argument, however, we assume they are uncertain, the principle of law announced above would clearly apply under the circumstances of this case.

(f) The Question as to What Is Property or Income and to Whom It Belongs Is a Matter to be Determined by the Local State Law.

The present Revenue Act and all prior acts clearly evidence and indicate an intention to *tax an individual on the income which belongs to him and not the income of others, and the question as to what is prop-*

erty or income in any particular case for the purpose of applying the Federal Income Tax Law is and has always been considered a matter depending solely upon the local state statutes and decisions defining income and property rights. It has always been recognized, as we have heretofore pointed out, that the Federal Revenue Acts, in taxing the income of *individuals,* do not purport to specify just how and under what circumstances income or property will vest in such individuals. The Federal Government generally recognizes that the laws of the respective States as to what is property and income, and in whom title to property or income is vested, are binding upon the Federal Government and will be followed by it, unless there is some *affirmative* and constitutional Federal Statute to the contrary.

This Court has repeatedly held that as a matter of settled policy it will follow the state decisions interpreting state laws governing property and property rights. See *De Vaughn* v. *Hutchinson,* 165 U. S. 566, at page 570; *Warburton* v. *White,* 176 U. S. 484, at page 496; *United States* v. *Crosby,* 7 Cranch, 115; *Middleton* v. *McGrew,* 23 Howard 45; *Lippincott* v. *Mitchell,* 94 U. S. 767; *Washington* v. *Miller,* 235 U. S. 422; *Buchser* v. *Buchser,* 231 U. S. 157; *Elmendorf* v. *Taylor,* 10 Wheat. 152, 159; *Hines Yellow Pine Trustee* v. *Martin,* 268 U. S. 458, 464; *Knights of Pythias* v. *Meyer,* 265 U. S. 30; *Bucher* v. *Cheshire R. Co.,* 125 U. S. 555; *Burgess* v. *Seligman,* 107 U. S. 20, 27.

The proposition of law we have stated, is well settled and has been consistently applied, without a question as to its soundness, by the General Counsel of the Internal Revenue Bureau and in every opinion of an Attorney General discussing the Community

Partnership laws, from the opinion of Attorney General Palmer in 1921 to the opinion of Acting Attorney General Mitchell in 1937 including the opinions of Attorney General Daugherty (1924) Stone (1924) and Sargent (1926). See 32 *Op. At. Gen.* 298, 435; 34 *ibid.* 376, 395; 35 *ibid.* 89, 265.

General Counsel Memorandum 6351 holds that certain cash bonuses received by a married woman in Texas constituted separate income to her and were not community property. The following language in the opinion of the General Counsel is illustrative of his view of the principle we have stated:

> "For the purpose of determining the respective rights of A and B in and to the fund which the bonuses constituted, the law of Texas must be considered, for it is settled that the Federal courts follow the State courts where they have spoken in regard to the property rights of their citizens. (*De Vaughn* v. *Hutchinson,* 165 U. S. 566; *Erie Railroad Co.* v. *Hilt,* 247 U. S. 97.) In this manner the Federal courts apply the State law in determining the owner of the fund regarded as income, and so ascertain the person to whom that income is to be taxed. (*Etta Radin, Administratrix* v. *Commissioner,* C. C. A. 3d. Circuit, April 9, 1929; G. C. M. 4596, C. B. VII-2, 133; I. T. 1267, C. B. I-1, 212; I. T. 2349, C. B. VI-1, 78; T. C. 2987, G. B. 2, 180)."

In the opinion of Attorney General Palmer, rendered February 26, 1921 (32 Op. Att-Gen. 435) in which it was ruled that separate returns of community income could be made by husbands and wives in the so-called community property states, except California, it was said:

"In *Warburton* v. *White* (176 U. S. 484, 496) the principle was enunciated that where State decisions have interpreted State laws governing property or controlling relations that are essentially of a domestic and State nature the United States Supreme Court will follow the State decisions if possible to do so, in the discharge of its duties. Also in *DeVaughn* v. *Hutchinson* (165 U. S. 566, 570) it was held that to the law of the State in which property is situated we must look for the rules which govern its descent alienation and transfer, and for the effect and construction of wills and other conveyances. In *United States* v. *Crosby* (7 Cranch, 155), it was held that the title to land can be acquired and lost only in the manner prescribed by the law of the place where same is situated.

"In arriving at an answer to the questions propounded by you we are called upon to determine the rules of property in the community property States; we have, therefore, pursuant to the rules of the above cases, adopted the rules laid down by the highest courts of the various States."

Attorney General Palmer, in concluding his opinion, said:

"That under the Revenue Act of 1918 and previous acts in Washington, Arizona, Idaho, New Mexico, Louisiana and Nevada, (excepting California) the husband and wife domiciled therein, in rendering separate income tax returns may each report as gross income one-half of the income which under the laws of the respective States becomes, simultaneously with its receipt, *community property.*"

Acting Attorney General Mitchell in his opinion of July 16th, 1927, *rendered after the decision in the Robbins case,* said:

"The Revenue Acts of the United States have been so drafted as to require the husband to return and pay income taxes upon the community income if that income belongs to him, and to prevent the wife from returning a share of the community income as her own, unless that share belongs to her * * *. The nature and extent of a wife's interest in community income in any of these States (Community States), is to be determined from the Statutes and decisions of the State. In determining the nature of an interest in community income created by State law, it is necessary for the Federal Courts to accept the decisions of the State courts construing the statutes creating the interest, and to determine from the statutes and decisions of the State courts the intrinsic nature of that interest."

Under the Texas, Washington, Louisiana and Arizona Statutes and Supreme Court decisions, the wife has a vested one-half ownership in community partnership property and income.

POINT II.

THE UNIFORM AND LONG CONTINUED EXECUTIVE CONSTRUCTION RECOGNIZING THE RIGHT OF HUSBAND AND WIFE IN ALL COMMUNITY PROPERTY STATES, EXCEPT CALIFORNIA, TO REPORT SEPARATELY THE SHARE OF COMMUNITY INCOME OWNED BY EACH, TOGETHER WITH THE REPEATED REFUSAL OF CONGRESS TO AMEND THE LAW SO AS TO AVOID SUCH CONSTRUCTION, AND THE RE-ENACTMENT BY CONGRESS, WITHOUT CHANGE, OF THE PROVISIONS OF THE REVENUE ACT, WHICH HAD RECEIVED SUCH A LONG CONTINUED AND UNIFORM EXECUTIVE CONSTRUCTION, CONSTITUTE A DEPARTMENTAL AND LEGISLATIVE HISTORY CONCLUSIVELY DEMONSTRATING THAT THERE WAS NO INTENTION IN THE REVENUE ACT OF 1926 TO TAX HUSBANDS ON THE HALF OF THE COMMUNITY PARTNERSHIP INCOME BELONGING TO THEIR WIVES.

Under the preceding headings of this brief we have discussed the plain and unambiguous meaning of the language used in the Revenue Act of 1926 without reference to departmental decisions, construing the language or to the legislative history in connection with the use of such language. We have attempted to make clear that the Revenue Act, taken alone and fairly and literally interpreted as a matter of independent statutory construction, does not justify the contention of the Government that the husband should be required to include in his individual income tax

return the half of the community partnership income which vests in the wife as it is earned.

We now propose to show that the opinions of the Attorney General and the Treasury Department in their rulings and decisions have repeatedly and consistently at all times up to this date interpreted similar language in the prior Revenue Acts as permitting husbands and wives to divide and report the community property partnership income in separate returns and that, furthermore, as a matter of legislative history, Congress has twice rejected, once in 1921 and again in 1924, attempts to write into the act language designed to bring about the result for which the Government is now contending. Such departmental construction and legislative history clearly demonstrate the practical intent of Congress, and this Court has repeatedly decided that the reenactment by Congress, as in this case, without change of a statute which has previously received a long executive construction, is an adoption of such construction. *United States v. Falk*, 204 U. S. 143, p. 152; *United States of America v. Cerecedo Hermanos y Compania*, 209 U. S. 339, and numerous other cases to be cited and discussed later.

The Executive Construction and Legislative History of the Various Revenue Acts Recognize and Affirm the Right of Husbands and Wives to Report in Separate Returns their Respective Shares of the Community Partnership Income.

As early as 1914, under Treasury Decisions 2090 and 2137, the Treasury Department ruled that income taxes are imposed upon each *individual* and that the separate incomes of husbands and wives should not be

combined in a return for the purpose of assessing surtaxes at the graduated rates. This ruling, of course, was merely in the nature of an announcement of what the law itself plainly stated.

Discussion between taxpayers and the Commissioner's Office in relation to the right of husbands and wives in Texas and other states to divide community income, resulted in the first published ruling in April, 1920, at which time specific recognition was given to the laws of Texas in Office Decision No. 426, reported at 2 C. B. 198. In this ruling it was held that income accruing from community property is the joint income of the husband and wife, in which each is entitled to one-half and that such income might be reported separately by each spouse for income tax purposes. This ruling was unsatisfactory, because it gave only partial recognition to the Community Property Law of the State of Texas and a protest against the Office Decision was made to the Solicitor of Internal Revenue, and the Attorney General of the U ited States was requested to give an opinion upon the subject. As a result of this request, the Attorney General, after careful consideration and exhaustive study, rendered an opinion under date of August 24th, 1920, which discussed at length the Texas Constitution, the Texas Statutes, Decisions of the Supreme Court of Texas and the interpretation of the Revenue Act. This opinion illustrates the conclusion of the Attorney General in relation to the right of husbands and wives in Texas to make separate returns of Community Partnership Income under the Revenue Act of 1918. After pointing out that

> "The Revenue Act of 1918 levies a tax on the net income of every individual (Sections 210 and 211)",

the Attorney General then reviews the Statutes and Decisions of Texas "determining property rights of husband and wife" and reaches the following conclusion:

> "Community property, under the laws of Texas, belongs jointly to husband and wife; it follows that the income therefrom accrues to husband and wife in equal shares."

It was, therefore, ruled that under the Revenue Act of 1918 a husband and wife in Texas might render separate income tax returns, each reporting, as gross income, one-half of the community income in which they had a joint and equal ownership under the State law.

This opinion of the Attorney General was subsequently published and adopted as Treasury Decision 3071, reported at 3 C. B. 221, and was carried into the Regulations which were applied retroactively. (For opinion in full, see appendix to this brief.) In the Texas opinion, it is to be noted, the Attorney General quoted from the Revenue Act of 1918 (Sections 210 and 211) and emphasized that the Act imposed a tax on the net income of *every individual*. The Attorney General also referred to decisions of the courts of other Community Property States and indicated that similar holdings might be made as to the other states.

While the Texas opinion was under consideration, the Solicitor of Internal Revenue and the Attorney General were confronted with requests from other Community Property States for a similar ruling and

briefs were filed with the Attorney General, pointing out that the same opinion should be rendered as to the other Community Property States.

As a result of the request of the Treasury Department, the Attorney General rendered an exhaustive opinion on February 26, 1921 (32 Op. Att.-Gen. 435), which was published and promulgated by the Treasury Department on March 3, 1921. *In this opinion the Attorney General construes the Revenue Act of 1918 and previous Revenue Acts as taxing a husband and wife, for normal and surtax purposes, on their income as separate individuals and held that under the Revenue Acts the question as to what was the income of the husband and what was to be considered as the income of the wife was a matter to be determined by an examination of the local Statutes and Supreme Court decisions in each of the Community Property States creating and defining property and property rights.* The Attorney General, accordingly, reviewed the Statutes and court decisions of the various Community Property States at length and reached the conclusion that the wife had an equal, vested and proprietary interest in half of the community property in the states of Washington, Texas, Louisiana, Arizona, New Mexico, Nevada and Idaho and might, in these States, make a separate return of half of such community income for income tax purposes.

In California, however, as pointed out by the Attorney General, the local Community Property Law was different in its attributes of ownership and legal nature from the other states and the California Supreme Court had recognized such fundamental difference. The Attorney General, accordingly, held that under the law of California the wife did not have

an equal vested interest in the community property with the husband but merely the right of an "expectant heir," and that the community income should be returned by the husband.

The same conclusion was reached in the opinion of February, 1921, as to the method of applying the Federal Estate Tax. It was held that in all of the Community Property States, *except California,* there should be included in the gross estate in computing the estate tax of a deceased spouse, one-half only of the community property of husbands and wives domiciled therein.

The opinion of the Attorney General is a carefully prepared and written document of about forty pages, which is printed in full in the appendix hereto. We here quote only certain parts of the opinion which we desire to particularly emphasize.

In the first place, the Attorney General at the outset states the question submitted to him for his opinion as follows:

> "Dear Mr. Secretary: My opinion has been requested upon the following questions:
>
> "1. In which of the States, other than Texas, in which the community property system exists may a husband and wife domiciled therein, in rendering separate income tax returns, each report as gross income one-half of the income which under the laws of such state becomes, simultaneously with its receipt, community property?
>
> "2. In which of the States in which the community property system exists should there be included in gross estate, in computing the estate tax of the estate of a deceased spouse, one-half and only one-half of the community property of husband and wife domiciled therein?
>
> * * * * * * *

"4. Do your answers to questions 1 and 2 apply under income and estate tax acts prior to the revenue act of 1918?"

"The community property system prevails in Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. The application of the income tax act to the income from community property belonging to husband and wife domiciled in Texas was disposed of in my opinion of September 10, 1920."

The opinion then quotes in full the statutes and discusses the decisions of the various Community Property States at great length and summarizes the Attorney General's conclusions as to the nature of the wife's interest in the States in question as follows:

"Summarizing, it appears that in all of the community property States except California their own courts have held that the wife has, during the existence of the marriage relation, a vested interest in one-half of the community property."

* * * * * * * *

"In my previous opinion it was stated that since in Texas the ownership in one-half of all community property vests in each spouse, whatever is income to the community is income to both. This conclusion applies, therefore, to all States in which community property is held to be vested equally in both spouses."

Finally discussing the applicability of the Federal Estate Tax in the Community Property States other than California, which the Attorney General excepted on the ground that the wife, under the California law and decisions, did not have a vested in-

terest in the community property but only an expectancy, he said:

> "While the community estate of husband and wife has not in the strictest sense all the incidents of a joint estate or an estate in the entirety as they were known at common law, I am convinced that the community estate is for all practical purposes within the language of subdivision (d) of section 402, there being deductible therefrom, in arriving at the net estate of decedent, the one-half interest of the surviving spouse which may be shown to have originally belonged to such person and never to have belonged to the decedent."

The Attorney General concludes his opinion as follows:

> "My answers to your questions are therefore—
> (1) That in Washington, Arizona, Idaho, New Mexico, Louisiana, and Nevada the husband and wife domiciled therein, in rendering separate income tax returns, may each report as gross income, one-half of the income which under the laws of the respective States becomes simultaneously with its receipt, community property.
> "(2) In the States mentioned in answer to question 1 there should be included in gross estate in computing the estate tax of a deceased spouse, one-half only of the community property of husband and wife domiciled therein.
> "(3) Neither of the above answers is based upon a statute enacted subsequent to March 1, 1913.
> "(4) My answers to these questions apply under income and estate tax acts prior to the revenue act of 1918.
>
> Respectfully,
> A. MITCHELL PALMER,
> *Attorney General.*

The above opinion was promulgated by the Treasury Department and put in operation by the issuance on March 3, 1921 of Treasury Decision 3138. (See Internal Revenue Bulletin No. 4 for June, 1921, at page 238.) The opinion of the Attorney General of February 26, 1921, is quoted in full as part of Treasury Decision 3138 in the appendix to this brief.

Community Property taxpayers in all of the States except California have been filing separate income tax returns ever since the date of the decision down to the present time. The Department never questioned the soundness of the opinion of the Attorney General from a legal standpoint and did not request the Attorney General to permit test suits. On the contrary, the Department permitted the filing of separate returns in the Community Property States, in accordance with the regulations and opinions in effect, and recognized that the opinion construing the Act of 1918, and prior acts, as well as the Treasury Decision, was a correct interpretation and decided that if Treasury Decision 3138 could be avoided at all, it could only be done by procuring special legislation by Congress specifically requiring the husband to return, in his *individual* income tax return, the entire community property income.

Revenue Act of 1921.

Without obtaining an opinion from the Attorney General as to the constitutionality of such special legislation, the Treasury Department, in order to avoid the law as it existed and as it had been interpreted in Treasury Decision 3138 and the opinion of the Attorney General, recommended to Congress that

the Revenue Law be changed; and the bill which later became the Revenue Act of 1921, as sent to the Senate by the House of Representatives, accordingly provided that:

> "Income received by any community shall be included in the gross income of the spouse having the *management* and *control* of the community property." (Italics ours.)

The amendment quoted above and sponsored by the Treasury Department was adopted by the Ways and Means Committee of the House of Representatives without an open hearing and was passed by the House without discussion. The Senate Finance Committee proposed that the final words be changed so as to read "of such community property," and that there be added the words "and shall be taxed as the income of such spouse."

The Amendment we have quoted was intended to overturn, in specific terms, the opinion of the Attorney General and the existing decision and rulings of the Treasury Department and was a direct attempt by the Treasury Department to write into the Revenue Act of 1921 exactly what the Government is now contending the Revenue Act of 1926 means without the amendment. The amendment was vigorously opposed by numerous senators on the floor of the Senate. (See later reference to Congressional Record.)

The opinion of Attorney General Palmer of February 26th, 1921, was submitted to the Senate and printed in the Congressional Record. Briefs were also filed and printed in the Congressional Record and arguments against the amendment were made on the

floor of the Senate by Senators Broussard, Ashurst, Jones of New Mexico, Jones of Washington, Ransdell, Borah, Poindexter and others.

In the discussion and argument, the fundamental and practical features of the community property laws were pointed out in detail and the amendment was attacked by many Senators on the floor as being unfair and as discriminating against the community property States. The arguments cover many pages of the Congressional Record.

As a result of the opposition to the amendment proposed by the Treasury Department, an amendment introduced by Senator Broussard, striking out the objectionable clause in the bill, was unanimously adopted and the community property amendment was eliminated from the bill. (Vol. 61, Congressional Record No. 146 for November 3rd, 1921, pp. 8037, 8038). The House later concurred in the elimination of the provision in question by the Senate and the Act of 1921 was passed with the amendment of the Treasury Department eliminated from the bill.

The Treasury Department, having failed to persuade Congress to adopt the amendment we have discussed, which, if constitutional, would have overturned the existing rulings of the Attorney General and the decisions of the Treasury Department, continued to accept separate returns from husbands and wives in community property states, and the opinion of the Attorney General and the decisions and regulations of the Department, construing the Revenue Acts of 1921, 1918 and prior years, remained in effect and operation without a question being raised as to their legal validity and soundness. It is obvious that the De-

partment recognized that nothing could be done by it to deprive community property taxpayers of the rights given them by the existing opinion and Treasury Decision interpreting the Revenue Acts, unless affirmative legislation by Congress could be obtained changing the law and specifically taxing husbands on community income in community property states. Accordingly, nothing further was attempted to be done by the Department until the revision of the Revenue Act was proposed in 1924.

Revenue Act of 1924.

The Department in 1924 again attempted to have a provision, similar to the provision which had been rejected in 1921, inserted in the proposed new Revenue Act. The following amendment was proposed by the Treasury Department and was in the Revenue Act as submitted to the Ways and Means Committee of the House:

> "Income received by any marital community shall be included in the gross income of the spouse having the *management* and *control* of the community property and shall be taxed as the income of such spouse." (Italics ours.)

At the public hearing held by the House Committee on Ways and Means, representatives of taxpayers of the various community property states involved appeared and in oral, as well as in written, arguments filed with the Committee explained the community property system and the opinion of the Attorney General and the Treasury Decision and made the same arguments that were made when the amendment, in

substantially the same language, was proposed in 1921. It was urged that the adoption of such an amendment would be unfair and discriminatory and the opinion of the Attorney General and Treasury Decision 3138 were submitted to the Committee on Ways and Means showing the existing interpretation of the Revenue Act.

The lengthy arguments made, as well as the opinion of the Attorney General and Treasury Decision 3138, are printed in full in the Hearings before Committee on Ways and Means, House Reports, Revenue Revision 1924, pp. 194, 348, 375, 478, 482. The Committee, with all this information as to the existing interpretation of similar language contained in previous acts, the rulings and practice of the Department, as well as a full discussion of the merits of the situation, rejected the amendment proposed by the Treasury Department, and the bill was finally passed with the amendment eliminated, thus clearly indicating that Congress approved and sanctioned the existing rulings and practice adopted by Treasury Decision 3138 as well as the interpretation of the Revenue Act contained in the opinion of the Attorney General permitting husbands to make separate returns of community income in community property states other than California under the Revenue Act of 1924.

Revenue Act of 1926.

The Revenue Act of 1926 contains the same language already referred to under a previous heading of this brief as the Acts of 1918, 1921 and 1924. The similar language used in the preceding Acts of 1918, 1921 and 1924 had been uniformly and continu-

ously construed by both the Attorney General and the Treasury Department. The regulations of the Department construing these Acts had been in effect and operation since 1920 and were in effect and operation when the Revenue Act of 1926 was passed. Two amendments, attempting to amend the Revenue Acts of 1921 and 1924 and designed to overturn and change the meaning and effect of the Revenue Law as construed by the Attorney General and the Treasury Department, had been previously rejected. In short, the Act of 1926, containing language similar to that construed in the previous Acts, was reenacted in the light of the executive and legislative history we have previously outlined in detail, and, under familiar and well settled principles of law, the same practical intent is to be presumed from the adoption of the 1926 Act as in the case of the 1924 and 1921 Acts.

This Court has Repeatedly Held That in the Interpretation of a Doubtful or Ambiguous Statute a Uniform Executive Construction and Administrative Practice will be Given Great Weight, and that the Re-enactment of a Statute in the Same Language which has Previously Received a Long and Uniform Executive Construction Amounts to an Adoption of the Executive Construction by Congress.

We have shown that the literal interpretation of the plain language of each of the Revenue Acts from the original Act down to and including the Act of 1926, as well as the executive and legislative history construing these Acts is contrary to the contention of the government in this case as to the meaning and intendment of the Revenue Act. If we should as-

sume, however, for the purpose of argument, that the Revenue Act is ambiguous, then we would point out that this Court has often held that when the meaning of a statute is doubtful, great weight should be given to the construction placed on it by the Department charged with its execution, and that the re-enactment by Congress, without change, of a statute, which had previously received long continued executive construction is an adoption by Congress of such construction. In this connection, Mr. Chief Justice Taft, in the case of *New York v. State of Illinois,* decided January 14, 1929 278 U. S. 367, said:

> "Nothing is more convincing in the interpretation of a doubtful or ambiguous statute,"

In *United States v. Cerecedo Hermanos y Compania,* 209 U. S., 339, this Court said:

> "We have said that when the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the Department charged with its execution. *Robertson* vs. *Downing,* 127 U. S. 607; *United States* vs. *Healey,* 160 U. S. 136. And we have decided that the re-enactment by Congress, without change, of a statute, which had previously received long continued executive construction, is an adoption by Congress of such construction. *United States* vs. *Falk,* 204 U. S. 143, 152.
>
> "Judgment reversed.
>
> "Mr. Justice White and Mr. Justice Peckham concur solely because of the prior administrative construction."

It is to be noted that in the above case Mr. Justice White and Mr. Justice Peckham evidently did not

agree with the construction previously placed upon the statute by the Department, but felt constrained, in view of the well established rule, to hold, that in view of the re-enactment of the statute without change, Congress had adopted the Department's previous construction of the statute.

In the case of *United States vs. Johnston,* 124 U. S. 236, cited by Mr. Justice Holmes in the case just quoted from, Mr. Justice Harlan rendered the opinion of the court, and said:

> "In view of the foregoing facts the case comes fairly within the rule often announced by this court that the contemporaneous construction of a Statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight and should not be disregarded or overturned except for cogent reasons and unless it be clear that such construction is erroneous."

In the case of *Copper Queen Mining Co. v. Arizona Board of Equalization,* 206 U. S. 474, Mr. Justice Holmes said:

> "And again, when for a considerable time a statute notoriously has received a construction in practice from those whose duty it is to carry it out, and afterwards is re-enacted in the same words, it may be presumed, that the construction is satisfactory to the legislature, unless plainly erroneous, since otherwise naturally the words would have been changed. * * * Even apart from the re-enactment a certain weight attaches to this fact. *U. S.* v. *Finnell,* 185 U. S. 236, 243; *U. S.* v. *Sweet,* 189 U. S. 471."

In *National Lead Company v. United States,* 252 U. S. 140, it is stated:

> *"The re-enacting of the drawback provision four times, without substantial change, while this method of determining what should be said under it was being constantly employed, amounts to an implied legislative recognition and approval of the executive construction of the statute. United States v. Philbrick, supra; United States v. C. Falk & Brother,* 204 U. S., 143, 152; *United States v. Cerecedo Hermanos y Compania,* 209 U. S. 337; *for Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the Government. United States v. Bailey,* 9 Pet. 238, 267."

In the case of *Komada & Co. v. United States,* 215 U. S. 392, it was held that a classification by the Revenue Department of a dutiable article under the Tariff Act was of controlling effect, especially after the law had been re-enacted without change as to the basis of classification.

In the case of *United States v. C. Falk & Bro.,* 204 U. S. 143, the departmental construction relied on had been based on an opinion furnished by the Attorney General, and the court, speaking through Mr. Justice McKenna, said:

> "And the Attorney General's opinion cannot be overlooked. The proviso which he construed in Section 50 of the Act of 1890 was re-enacted in Section 33 of the Act of 1897. It would be extreme to hold that Congress, by doing so, intended to set up the technical rule relating to provisos against the construction of the Attorney General and to change that construction by repeating the very words construed. And there could have been no oversight. The practice of the executive officers for years gave emphasis

> and materiality to the construction. * * * This, then, is our view: The Attorney General having construed the proviso of Section 50 of the Act of 1890 as not restricted to the matter which immediately preceded it, but as of general application, and this construction having been followed by the executive officers charged with the administration of the law, Congress adopted the construction by the enactment of Section 33 of the Act of 1897." (Italics ours.)

The most recent assertion of this doctrine is in the decision of this court dated May 26, 1930, in the case of *United States of America v. James E. Farrar,* 281 U. S. 624. This case involved the question as to whether or not the prohibitions and penalties of the National Prohibition Act apply to a purchaser of liquor. Although Section 6 of the Act provided that no one should purchase any liquor without first obtaining a permit and although there are no express words in the Act exonerating a purchaser from liability under the penalties thereof, yet the court by unanimous opinion held that the indictment charged no offense because of the legislative and executive history of such provisions under which purchasers have not been considered as being guilty of the offense. The language of the Act was clearly ambiguous and this court concluded its opinion with the following significant sentence:

> "If aid were needed to support this view of the matter, it would be found in the fact, conceded by the government's brief, that during the entire life of the National Prohibition Act, a period of ten years, the executive departments charged with the administration and enforcement of the act have uniformly construed it as not in-

cluding the purchaser in a case like the present; no prosecution until the present one has ever been undertaken upon a different theory; and Congress, of course well aware of this construction and practice, has significantly left the law in its original form."

To the same effect are *Brewster v. Gage*, 280 U. S. 327 (1930); *United States v. Sweet*, 189 U. S. 47; *Heald, et al., Committee of the Person and Estate of Peters v. District of Columbia*, 254 U. S. 20; *N. Y. N. H. & H. R. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361; *United States v. Finnell*, 185 U. S. 236; *United States v. Philbrick*, 120 U. S. 52; *United States v. Alabama Great Southern R. R. Co.*, 142 U. S. 216; *Edwards v. Darby*, 12 Wheat. 206.

We have seen from the executive and legislative history of this controversy that in 1920 and in 1921 an Attorney General's opinion was rendered and promulgated interpreting the Revenue Act of 1918 and prior Acts as permitting husbands and wives to make separate income tax returns, and to report in their returns the community income of each as defined and fixed by the laws and decisions of the State in which they were domiciled; that these opinions were promulgated, and Treasury decisions and regulations, as a result of the opinions, were adopted and have remained in effect and operation from 1921 until after the adoption of the Act of 1926, without being questioned, qualified or withdrawn, during which time there were three revisions of the Revenue Act, one in 1921, one in 1924 and the last in 1926; that in 1921 and 1924 Congress rejected amendments designed expressly to overturn the existing construction and rule of the Department. Congress, in the light of and with *actual knowledge* of the executive and depart-

mental construction and administrative history of the previous acts already referred to, re-enacted the law three times without change. In none of the cases we have cited is there presented so strong a situation as we have in the instant case.

The Government's Contention that "Control" and not "Ownership" is the Test of Income Taxation Under the Revenue Act of 1926 is Inconsistent with and Contrary to the Last Opinion on this Subject Rendered by Then Acting Attorney General William D. Mitchell, on July 16, 1927 (after the Robbins Case Dealing with the California Law, was Decided), in which Opinion it was Ruled that the Revenue Act of 1926 Intends to Tax a Husband and Wife on the Income of Each to be Determined by the Statutes and Decisions of Each State.

It is submitted that the Government's contention in relation to the interpretation of the Revenue Act of 1926 is inconsistent with the opinion of then Acting Attorney General Mitchell, rendered July 16, 1927, in which the meaning and effect of the Revenue Act of 1926 and the *Robbins* case were carefully considered and these various test suits suggested. Mr. Mitchell, after discussing the *Robbins* case and the laws of the other Community Property States, suggested that test suits be arranged to determine whether the laws of the other Community Property States were sufficiently different from the laws of California to justify a change in policy on the part of the Treasury Department.

The portions of the opinion of Acting Attorney General Mitchell addressed to the Treasury Depart-

ment, pertinent to the discussion under this heading of our brief, are as follows:

"Department of Justice,
July 16, 1927.

"Sir: Under date of February 3, 1926, you asked me to reconsider two opinions of the Attorney General, the first dated September 10, 1920 (32 Op. 298), and the second dated February 26, 1921 (32 Op. 435). These opinions deal with the nature of the wife's interest in community income under the systems prevailing in the States of Texas, Washington, Arizona, Idaho, New Mexico, Nevada and Louisiana, a list which includes all of the States excepting California in which any form of community property system is in force. In the earlier opinion it was held that in Texas the wife had such an interest in the community income as to entitle her to return half of it as her income under the Revenue Act of 1918. In the opinion of February 26, 1921, a similar conclusion was reached respecting the wife's interest in the community income under the systems prevailing in the other States mentioned.

"Your request for reconsideration followed the decision of the Supreme Court of the United States in the case of *United States v. Robbins,* 269 U. S. 315, decided January 4, 1926, in which it was held that the wife's interest in the community income under the system in force in California in 1918 was not substantial enough during the existence of the community to entitle her to separately return half of it as her income under the Revenue Act of 1918.

"*The questions involved are not matters of construction of the Revenue Acts of the United States, but involve the nature of the wife's interest in the community income.* The Revenue

Acts of the United States have been so drafted as to require the husband *to return and pay income taxes upon the community income if that income belongs to him, and to prevent the wife from returning a share of the community income as her own unless the share belongs to her. The nature and extent of a wife's interest in community income in any of these States is to be determined from the statutes and decisions of the State.* In determining the nature of an interest in community income created by State law, it is necessary for the Federal courts to accept the decisions of the State courts construing the statutes creating the interest and to determine from the statutes and decisions of the State courts the intrinsic nature of that interest. While the *adjectives* used by State courts in an effort to describe the nature of the wife's interest in community income are not necessarily controlling on the Federal courts as to the extent of the wife's interest, decisions of the State courts holding what rights of a proprietary nature the wife may exercise in respect of community income are binding on the Federal courts. I have made these observations to show that it has been necessary, as the result of your request, to make a very exhaustive examination of the statutes and decisions of the seven States mentioned relating to community property. This laborious task was undertaken with the expectation of reaching conclusions on the law which might be expressed in response to your request for reconsideration, but the result has led me to the conclusion, which possibly I might have anticipated at the outset, that the problems presented can not be settled by any opinion of the Attorney General and that the situation makes it inappropriate under established precedents for me to express my conclusions. * * * "

"My predecessors have refrained from render-

ing opinions on questions pending in the courts for decisions and have frequently refrained from expressing opinions where it is evident that the matter is known to be the subject of judicial decision in the immediate future. * * *

"The decision in the case of *United States v. Robbins, supra,* dealing with the California system, does not necessarily dispose of the problem in the other States in which some forms of the community property system are in effect. In that case the ultimate inquiry was to the extent to which, under the statutes and decisions of California, the wife could exercise rights of ownership over a share of the community income. The same problem arises in each of the other States above mentioned. There are very substantial differences between the so-called community property system in these various States. No two of them are just alike. Some resemble very closely the system in California dealt with in the *Robbins* case, but in other States the systems differ very considerably from the California system. In some of the States the extent of the wife's proprietary interest or ownership in community income derived from one source differ from that in community income derived from other sources. * * *."

"While I have acquired opinions on the subject as a result of the examination of the statutes and decisions of these States and the proper answer to the questions involved may be more evident as to some of the States than as to others, I believe for the reasons stated that it would be inappropriate and ineffective for me to deal with the subject in an opinion with a *view to having your regulations and methods of dealing with community income changed.* The answers to the questions involved are not so obvious as to make it clear what conclusions the courts may reach. To overturn by administra-

tive actions and in reliance on an opinion of the Attorney General the method of dealing with community income which has prevailed in seven States, with the possibility that, in the end, the courts would not agree with our views, would produce the utmost confusion and create an intolerable situation.

"On the other hand, so long as the former opinions referred to are allowed to stand, they interfere with your taking any steps to have these questions determined in the courts, and it must be admitted that the decision in *United States v. Robbins* has raised very substantial doubts as to the soundness of the two opinions.

"*The questions involved are not such as may appropriately be set at rest by congressional action. As the nature and extent of the wife's interest in community income are matters determined by the laws of the States, Congress may not by any enactment change the nature of the wife's interest;* and as the problem involved is not one of construction of the Revenue Acts of the United States, the rule that re-enactment of a statute after an administrative construction of it is legislative adoption of the construction, has no application to this case.

"For these reasons I feel constrained to, and do now, withdraw the two opinions referred to in order to leave you free, as has been done in similar situations, to arrange for test cases in the courts or otherwise deal with the matter as you may think proper.

Respectfully submitted,

WILLIAM D. MITCHELL,
Acting Attorney General."

As the foregoing quotations show, Attorney General Mitchell construed the *Robbins* opinion only as "raising doubts" as to the correctness of prior rul-

ings of the Attorney General and the Treasury Department as to the *local law* of the other community property states with reference to the wife's ownership in half the community income under the applicable local law. No suggestion was made by Attorney General Mitchell or by the Treasury Department that the *Robbins* decision should be taken as introducing a new theory of statutory construction of the Federal Revenue laws so as to set aside and make irrelevant the wife's ownership in community income and determine taxation only by reference to the husband's control of income actually belonging to the wife. It was not until the arguments in the present test cases that the Government advanced the theory that the effect of the *Robbins* decision was to establish as a matter of statutory construction an entirely new rule for the application of income taxes based not upon ownership but upon control.*

*In the foregoing discussion of the Revenue Act of 1926 no reference has been made to Section 1212, for the reason that it is conceded by all parties that this Section was simply a quieting statute governing past years and has no application and was not intended to have any bearing whatever upon future years or the issues presented in this case. See statement made in the brief of the Government in *Poe vs. Seaborn*, No. 15, page 9, footnote, where, after reference to the opinions of the Attorney General holding that a husband and wife domiciled in the States of Washington, Texas, Louisiana, Arizona, Nevada and Idaho were entitled to divide the community income in separate returns while a similar privilege was denied to married taxpayers domiciled in California, it is said:

> "This procedure was subsequently given retroactive legislative approval as to 1925 and prior years by Section 1212 of the Revenue Act of 1926, *infra*. That Section was not intended to apply to taxes for subsequent years and has no bearing on the question here involved."

See also the brief of Mr. Mitchell, as Solicitor General, in the case of *Zemurray vs. United States*, reported as 278 U. S. 600.

POINT III.

THE DECISION OF THE SUPREME COURT IN THE CASE OF *UNITED STATES V. ROBBINS*, INVOLVING THE LAW OF CALIFORNIA, IS NOT APPLICABLE TO THE LAWS OF OTHER COMMUNITY PROPERTY STATES AND DOES NOT SUPPORT THE GOVERNMENT'S CONTENTION THAT CONGRESS INTENDED TO TAX ALL COMMUNITY INCOME IN OTHER STATES TO THE SPOUSE HAVING CONTROL OF THE RECEIPT AND ADMINISTRATION AND DISPOSITION THEREOF.

(a) The Robbins Case Deals only with the Local Law of California, and the Underlying Theory of the Decision is that under the Decisions and the Statutes of California, the Husband is in Law the Owner of All of the Community Property and Income, and Possesses All of the Substantial Attributes of Ownership.

It will be helpful to review briefly the circumstances under which the *Robbins* case arose and was decided. We have already called attention to the fact that in the opinion of Attorney General Palmer in 1921, he interpreted the Revenue Act of 1918 and prior Acts as taxing husbands and wives in community property states on the share of the community income, which under the local state law belonged to each spouse. The conclusion was that in all of the states except California, the wife had, under the local state statutes and decisions a vested one half ownership in the community income as it accrued. In California, however, the wife's interest

was not *vested*, but was only that of an "expectant heir," and he accordingly held that California husbands and wives were not entitled to make separate returns as in the other community property states.

The California citizens were not satisfied with the Attorney General's interpretation of their local law and decisions and took the matter to the courts. A test suit was instituted in behalf of a certain Robbins of California, in an effort to have the United States Supreme Court recognize that in California under the local law and decisions, the wife had a vested ownership in community income as in the other community property states, so that California would benefit by the existing rulings and decisions of the Treasury Department in this regard. The Government contended in the suit that under the California statutes and decisions, as distinguished from the statutes and decisions of the other community property states, the wife had not a substantial vested ownership in community income but "a mere expectancy."

The Supreme Court sustained the contention of the Government, and it was held that the citizens of California were not entitled to the benefit of the community property rulings for income tax purposes that were applicable to the other community property states. This decision was clearly correct because of the substantial difference between the California law and that of the other community states. The court, however, after deciding the question as to whether the wife's right in community income was vested or amounted to a mere expectancy, which was considered by counsel on both sides to be the sole issue in the case and which was sufficient to dispose of it,

went further and used language in the last paragraph of its opinion which the Government's attorneys now contend is to be taken as indicating that because of the husband's control and administration as managing partner over the community property income in states where (unlike California) the wife's vested ownership in the community property has always been recognized, Congress not only had the power to tax the entire community income to the husband, but had indicated an intent to do so.

It is important to note that the questions discussed in the last paragraph of the *Robbins* case were not contended for or even suggested by the Government, either in its brief or in oral argument in that case. Both the Government and the California attorneys admitted, as the Treasury Department and the Attorney General had ruled for many years, that the sole question at issue in the case was whether or not the wife had a one-half vested ownership in the community property income under the law and decisions of California, and that the right to make separate returns under existing rulings and decisions depended entirely on the decision of the court on this point alone.

The questions suggested in the last paragraph of the decision were not contended for by the Government, and were assumed by all parties to the case to be clearly settled in the light of the language of the various Revenue Acts as well as the previous executive and legislative interpretations and history of the construction of the Revenue Acts. Counsel for neither side emphasized the literal construction of the Revenue Act upon its face, or the executive and legislative history of the community property controversy, which

would have shown the court that Congress had twice rejected two amendments attempting to tax husbands on the entire community income, irrespective of the question of ownership. In short, the court did not consider the legislative history in relation to the question of statutory construction, nor any contention that "control" rather than "ownership" should be the test of taxability.

The court in the last paragraph of the *Robbins* case stated in substance that the wife's interest was so insubstantial, and the power and control of the husband over the community property was so unlimited that the husband was not only technically and legally the owner of all of the community property under the California law, but was also, in fact and in substance, the real owner. It was discussing the California law throughout, and after referring in the first paragraph to the decisions of the California Supreme Court defining the wife's interest as a "mere expectancy," then proceeded in the second paragraph of the opinion, to analyze the attributes of ownership as fixed by the local California statutes and decisions, and concluded that the wife had none of the real attributes of ownership, but, on the other hand, unlimited control and all of the attributes of ownership were vested in the husband, and that accordingly the Revenue Act "intended to tax him for the whole."

The opinion was fitted peculiarly to the California situation, and was not intended to apply to community property systems radically different from the California system of laws. In short, the *Robbins* case held that the wife's interest in community income under the California law was so shadowy and insubstantial that Congress intended to impose the tax

upon the husband because he was, both under the California law and in substantial fact, the real owner of it.

(b) The Reasons Presented in Support of the Conclusions Reached in the Last Paragraph of the *Robbins* Case are at Most Reasons and Arguments Why Congress had the Power to and, as Matter of Legislative Policy SHOULD Tax Husbands in States having Community Laws Similar to California on the Entire Community Income, Including the Portion of the Community Income in Which the Wife Has Only an Expectant Interest Similar to Her Interest in California; and do not Show That Congress Actually INTENDED to Use or Actually Did Use Language Taxing Husbands in Other States on the Portion of the Community Income in Which Under the Local Law, the Wife has a Present and Substantial Ownership at the Time it Accrues.

In the first paragraph of the *Robbins case*, dealing with the real issue presented and argued by counsel as to whether the wife had a substantial vested interest in community income under the laws and decisions of California, the Court said:

> "Elaborate argument was devoted to the question whether the interest of a wife in community property has the *relatively substantial* character in California that it has in some other States. That she has vested rights has been determined by this court with reference to some jurisdictions. *Warburton v. White*, 176 U. S. 484; *Arnett v. Reade*, 220 U. S. 311.
>
> * * * * * * * *

> "We can see no sufficient reason to doubt that the settled opinion of the Supreme Court of California, at least with reference to the time before the later statutes, is that the wife had a mere expectancy while living with her husband. The latest decision that we have seen dealing directly with the matter explicitly takes that view, says that it is a rule of property that has been settled for more than sixty years, and shows that *Arnett v. Reade,* 220 U. S. 311, would not be followed in that State. *Roberts v. Wehmeyer,* 191 Cal. 601, 611, 614."

It will be noted from the above quotations that the decision recognized that the wife had vested rights in community property in some jurisdiction, and specific reference is made to two decisions of this court to support this proposition. (*Warburton v. White,* 176 U. S. 323, and *Arnett v. Reade,* 220 U. S. 311). In fact, these decisions were in part the basis of the opinions of the Attorneys General heretofore referred to. The Court, it is to be noted, does not indicate that there is any reason whatever to doubt the soundness of the rule previously announced with reference to the wife's vested interest in some of the other community property States. It holds that the law and decisions of California, however do not recognize such a vested interest in the wife, and that it is clear that *Arnett v. Reade,* holding that the wife had a vested interest in community property in the State of New Mexico, under the local statutes and decisions, "would not be followed in California" by the California courts. The Court clearly implies that the question of vested right is dependent solely upon State laws and decisions and accordingly announced that under the law of California, a wife did

not have a vested right as was the case in some of the other community property states.

The Court, however, goes further in the second paragraph of the decision and raises questions with regard to the *power* and intent of Congress. The paragraph is very brief and reads:

> "Even if we are wrong as to the law of California and assume that the wife had an interest in the community income, that Congress *could* tax if so minded, it does not follow that Congress *could* not tax the husband for the whole. Although restricted in the matter of gifts, etc., he alone has the disposition of the fund. He may spend it substantially as he chooses, and if he wastes it in debauchery the wife has no redress. See *Garrozi v. Dastas*, 204 U. S. 64. His liability for his wife's support comes from a different source, and exists whether there is community property or not. That he *may be* taxed for such a fund seems to us to need no argument." (Italics ours.)

It is clear from the above quotation, that the Court was, at this point, discussing only the *power* of Congress to tax a California husband on income in which the wife had an interest not more substantial in character than she possessed in California in *view of the fact he alone had disposition of the fund.*

The Court outlined various rights of the husband under the law of California, with reference to the community property as reasons why Congress had the *power* to tax the husband for the wife's property. But the reasons thus given by the Court, leading to the conclusion that Congress had the *power* to tax the husband for the whole community income, are not in any sense reasons to support

the argument that Congress *intended* to or *actually* did tax the husband on the whole income in any of the Revenue Acts, including the Act of 1926.

The question of *power* suggested by the Court would have been squarely raised if Congress in 1921 or in 1924 had adopted the amendments suggested by the Treasury Department, which in express language, imposed a tax on the husband having the control and administration of the community property, irrespective of any question of community ownership. These amendments, it will be remembered, were both rejected by Congress. It must, we think, be admitted, therefore, that logically the various enumerations of the laws of California set out by the Court are at most reasons why Congress *should*, or as the opinion put it, *could*, pass appropriate legislation taxing the husband on the entire community income if Congress so desired, but are in no sense reasons in support of a present interpretation of the Revenue Law that Congress has actually indicated such an intention.

The next two sentences of the *Robbins* opinion read as follows:

> "The same and further considerations lead to the conclusion that it was intended to tax him for the whole. For not only should he who has all the power bear the burden, and not only is the husband the most obvious target for the shaft, but the fund taxed, while liable to be taken for his debts, is not liable to be taken for the wife's, Civil Code Section 167, so that the remedy for her failure to pay might be hard to find."

Thus, after giving reasons based on an enumeration of the laws of California as to why it thought Congress had the *power* to tax the husband for the

whole, the Court said: "The same and further considerations lead to the conclusion that it was intended to tax him for the whole." The reasons given in the preceding quotations are along the same lines as the reasons given in support of the *power* of Congress to tax the husband for the whole. But the considerations which support the conclusion that Congress *could,* under the Constitution, impose on the husband a tax on the wife's half interest in the community, would not be sufficient to demonstrate that Congress *had in fact* undertaken to so tax the husband. The "further considerations" referred to by the Court, are relevant, not to the questions as to which alternative Congress *actually chose,* but to the wisdom and policy of choosing one way rather than the other. *They do not deal with the question of actual intent as shown by the language of the Revenue Act or with the question of actual intent as shown by the meaning and definition of the word "income" in the Constitutional Amendment, and it is important to note that the court makes no reference to the language either of the Revenue Act or of the Constitution.* We may say, parenthetically, at this point, that the reasons advanced in the *Robbins case* as showing that it would be wise policy to tax the husband for the whole of the community property, were substantially the same reasons presented to Congress by the Treasury Department in support of the Amendments proposed in 1921 and 1924 already referred to, and these two Amendments, it must be remembered, were rejected because the reasons advanced by the other community property states against their adoption based on the practical aspects of the laws of the community property states other than California,

convinced Congress that it was unfair and unwise to tax the husband for the whole of the community income.

The Court in the *Robbins* case concludes its reasons in support of the advisability of taxing the husband for the entire community income irrespective of the wife's expectant ownership of half of the income as follows:

> "The reasons for holding him (the husband) are at least as great as those for holding trustees in the cases where they are liable under the law."

The above statement is another suggestion possibly relevant to the question of the *power* of Congress as well as the policy and desirability of Congress taxing the husband for the whole community income in community property states. It cannot, however, in any sense be contended that it is an additional reason supporting the proposition that Congress *actually did* bring about this result and that the Revenue Act of 1918, as well as subsequent Acts can be interpreted as showing an intent on the part of Congress to tax the husband as an individual on the entire community income. We have already, under a previous heading of this brief, pointed out that the Community Partnership is not described under the heading "Trusts" in the Revenue Act, and at this juncture, we desire to again emphasize that the analogy suggested by the Court although it may logically indicate that Congress *could*, as a matter of constitutional power, treat husbands as trustees of the wives' one-half of the community income in community property states, does not support the

argument that Congress *has* actually described and included husbands in such a definition. Finally, if the analogy of the trustee were logically applied to the Community Property Law where the husband is master and managing partner of the marital partnership, the only inference warranted would be that the husband, as a quasi trustee of the half of the community income and property belonging to the wife, should, as such quasi trustee, make a separate report and pay a separate tax on such income. The trust analogy, however, would not possibly justify the conclusion that the husband should include in *his personal return* the separate income from his wife's half of the community property which he held only as quasi trustee.

The final opinion by Acting Attorney General Mitchell in 1927 on this subject states that the real point in issue in the *Robbins* case was whether or not the wife under the statutes and decisions of California had a real and substantial ownership in the community property. The enumeration of the husband's rights in the closing part of the decision showed that the respective rights of the husband and wife in the property were not out of harmony with the California decisions which held that she had merely an expectancy. In other words, the court having found that the California decisions interpreted the law of that state as giving the wife merely an expectancy, it was pertinent for the court to point out that the rights of control which could be exercised by the husband under the California law were not inconsistent but rather affirmed the California court holdings that the only interest of the wife was an expectancy. Certainly there is no express lan-

guage in the decision to justify the contention now made by the government for the first time that this court intended to set forth a new rule of statutory construction to the effect that control rather than ownership was the test to determine whether or not an individual should pay taxes levied under the Revenue Acts. In the first part of the opinion the court recites that the Treasury Department had made a distinction between the law of California and that of the other community states and it was therefore in order to enumerate the broad rights of control by the husband in California which justified the distinction theretofore made by the Department. In fact, in the brief of the government in the *Robbins* case, there was such an enumeration which *contrasted* the rights of the husband and wife in California with those in the other community states.

POINT IV.

THE DECISIONS IN CORLISS V. BOWERS AND LUCAS V. EARL, CITED IN THE GOVERNMENT'S BRIEF, ARE NOT APPLICABLE TO THE ISSUES INVOLVED IN THESE CASES.

In *Corliss vs. Bowers*, 281 U. S. 376, the court was dealing with Section 219 of the Revenue Act of 1924 which expressly provided that where the grantor of a trust had at any time during the taxable year the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year should be included in computing the net income of the grantor. This new provision of the revenue law was inserted as a clear exception to the general rule and history of the Revenue Act taxing "individuals" on the basis of

ownership of income as determined by state law. This amendment specifically taxing the donor of a revocable trust was designed to meet a particular situation, *i. e.*, to prevent individuals from establishing revocable trusts in favor of the members of their families and their friends in order to reduce income taxes, which was formerly done under the law as it had previously existed. No question was open as to the intent of Congress which was clearly expressed and the only point for argument was constitutional power. The court upheld the statute on the ground that

> "The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income whether he sees fit to enjoy it or not."

In the present case the executive and legislative history of the Revenue Acts negative any intent of Congress to tax the community income entirely to the husband because of his powers of management and control. Congress, in fact, has twice rejected amendments which were expressly designed and worded to bring about this result.

Furthermore, the reasoning in the *Corliss* case with reference to the constitutional question involved is inapplicable to the present cases, because the husband in Louisiana, Texas, Washington and Arizona has not the "unfettered command" of the community income, but, on the contrary, is analogous to a managing partner, agent or trustee, as pointed out in the original briefs filed in these cases discussing the Community Property Laws of Louisiana, Washington, Texas and Arizona.

In *Lucas vs. Earl,* 281 U. S. 111 (1930), the salary and attorneys' fees were earned by the husband and under the law of California were owned by him. He attempted by special contract with his wife to procure a different result. It was held that as the salary vested in him when it was earned, it was all taxable to him and this result would not be prevented by a contract requiring him to share it with his wife *after* it had accrued. In the present case, the wife's interest in the community income vested from the moment of its accrual. From that moment, the husband's dealings with it were subject to the limitations already fully set forth. There was never a moment when the income vested in the husband free of those limitations. Moreover this result flowed from the ~~Louisiana~~ local law and not from any special contract.

We direct the court's attention also to *Shellabarger v. Commissioner of Internal Revenue,* 38 F. (2d) 566, (C. C. A. 7, 1930), holding that income is taxable to the person to whom it accrues or belongs and not to the person who happens to receive it. So in these cases the fact that all of the income may be received in the first instance by the husband does not indicate that it is all taxable to him, for half of that income accrues and belongs to the wife and can be taxed only to her.

POINT V.

THE CONTENTION OF APPELLANT THAT THE REVENUE ACTS IMPOSE INCOME TAX UPON ONE INDIVIDUAL AS AN INCIDENT TO HIS CONTROL OF THE INCOME VESTED IN ANOTHER INDIVIDUAL UNDER THE APPLICABLE LAWS OF THE STATES MUST BE REJECTED BECAUSE SUCH CONSTRUCTION WOULD RENDER THE STATUTE UNCONSTITUTIONAL IN THAT

(a) **It Would be in Part a Direct Tax, Not Based on Income of the Person Taxed and Not Apportioned;**

(b) **It Would Result in a Tax Not Geographically Equal and Uniform; and**

(c) **Such a Basis Would be so Arbitrary and Capricious as to Constitute Taking of the Property Without Due Process.**

It must be borne in mind that in each of the four states in question, under the settled laws of such states, one half of the community property actually vests in the wife and one half in the husband and that this vested right has heretofore been recognized by this court in *Warburton v. White,* 176 U. S. 484, and *Arnett v. Reade,* 220 U. S. 311. Also under the laws of each state one half of the community income vests in each spouse as it accrues. In no two states are the statutory provisions as to the control of the joint property or joint income identical, but in all of them there are certain limitations upon the control, certain divisions of the right of control and each spouse has the absolute right to devise or bequeath the share of the estate belonging to such spouse independent of any action by the

other. The co-equal interest of one spouse is, in practically all cases, inseparably affixed to that of the other. This is particularly important in dealing with the proposition that the tax as laid upon appellee must fail because it is a direct tax, not based on income and not apportioned.

In considering any statute the court will avoid any grave doubt as to its constitutionality. This does not mean that the court will first determine that a particular construction is unconstitutional and then reject it, but it means that if there is grave doubt as to constitutionality, the construction will be avoided. This proposition has been frequently stated in varying ways. Mr. Justice Holmes said in a similar case that:

> "It is enough—to point out that at least there would be very serious questions to be answered before Mrs. Frick and Miss Frick could be made to pay a tax upon the transfer of his estate by Mr. Frick." *Lewellyn v. Frick*, 268 U. S. 238.

In the same case the Court said that it did not propose to discuss the limits of the powers of Congress in cases of that character.

In *United States v. Jin Fuey Moy*, 241 U. S. 394, 401, the Court said:

> "A Statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

In *U. S. v. Delaware & Hudson Company*, 213 U. S. 366, 408, it is said:

> "Unless this rule be considered as meaning that our duty is to first decide that a statute is

> unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning which causes it not to be repugnant to the Constitution, the rule plainly means that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided—, our duty is to adopt the latter. *Harriman v. Interstate Commerce Commission,* 211 U. S. 407."

See also *U. S. v. Walter,* 263 U. S. 15; *The Abby Dodge,* 223 U. S. 166, 172; *Home Savings Bank v. Des Moines,* 205 U. S. 503.

Does grave doubt exist in this case?

Unconstitutionality was one of the reasons urged upon Congress when it refused to modify the 1921 law to expressly include community income as taxable to the husband. In his brief in the Supreme Court in the *Robbins* case, the present Attorney General, Mr. Mitchell, said, page 6:

> "The United States could not lawfully compel the wife to pay an income tax on any share of the community income because it is not hers but is the income and property of her husband."

And on page 58:

> "If the United States by statute should attempt to compel the wives of California to return as their own a share in the community income under this system, and attempt to render the wife personally liable for an income tax on that share, its validity would have to be denied on the ground that wife has no real interest in the income and she cannot be rendered personally

liable for the income tax on her husband's income."

If Mr. Mitchell was right in his legal conclusion as to the want of power of Congress to make a wife pay a tax on a part of her husband's income—and we think he was right in so saying—can Congress make a husband pay taxes on his wife's income?

That lack of constitutional uniformity might result from failure to recognize ownership is frankly suggested in Mr. Mitchell's opinion to the Treasury Department dated July 16, 1927, where it was said in part:

> "If it be the fact that in some or all of these states in which a community property system prevails, the wife has no real ownership in community income during the existence of the community, an attempt by Congress to allow wives in those states to return part of the community income as their own, while in those states not having a community property income, wives are not allowed to return any part of their husband's income, would raise a serious question under the uniformity provision of the Constitution of the United States."

Certainly we are not alone in thinking that grave constitutional questions will have to be decided if the system of taxation employed by appellee is held to be required by the terms of the Statute. Bearing in mind this most important rule of statutory construction, and the fact that the present head of the Department of Justice has expressed views in accord with ours, we ask the Court to consider the merits of the constitutional questions which will be next discussed.

(a) It Would be in Part a Direct Tax Not Based on Income of Person Taxed and Not Apportioned.

All direct taxes, save and except those upon income, must be apportioned. The Sixteenth Amendment did not extend the taxing power of Congress but only relieved it from the necessity of apportioning taxes levied upon income. *Eisner v. Macomber,* 252 U. S. 189. It will also be conceded that Congress cannot, by any definition which it may adopt, make something taxable as income which is not within the purview of the term "income" as used in the Sixteenth Amendment. So our inquiry is, whether or not any portion of the tax exacted from the husband was not on his income, in the constitutional sense, and if not, whether it is, nevertheless, a direct tax.

We submit that the tax upon one-half of the amount fixed by appellant is not on the income of the husband because he did not own it. It belonged to his wife. That ownership is the basis of income in the constitutional sense, is certainly the ordinary conception and is the usual basis of taxation:

> "With respect to taxation, usually, if not necessarily, property and its owners are inseparable." *Homes Savings Bank v. Des Moines,* 205 U. S. 503.

Income is—

> "The gain derived from labor, from capital or from both combined, provided it be understood to include a profit gained through the sale or conversion of capital assets." *Eisner v. Macomber,* 252 U. S. 189.

How that which one does not own, which one cannot deal with as an absolutely free agent, which one cannot bequeath, can be considered his gain or profit, cannot be explained unless we revise our accepted meanings, not only of income but of the more ordinary words "gain" and "profit." It would be equivalent to saying that sums received by a guardian for his ward, by a partner for his partnership, or by a trustee for his beneficiaries, constituted the gain or profit of the guardian, of the partner, or of the trustee alone, as to say that the entire sum of community gains received by a husband in his fiduciary and representative capacity is his gain.

We are not dealing here, or elsewhere in this brief, with the power of Congress to group husbands and wives together into taxable units as they have done under prior laws with partners or with unincorporated associations. This presents an entirely different question, and when such a law of general application is passed, it will be time enough to consider its validity.

Is such a tax a direct tax? We need only to consider so much of the tax in the present cases as is derived from real estate and invested in personal property. Rents and dividends make up part of the income in these cases. While in their original classification between direct and indirect taxes, direct taxes might have included only capitation taxes and taxes on lands and perhaps personal property, it has long since been settled that to tax the revenue from land or invested personal property is, in effect, to tax the property itself and that such a tax is sufficiently direct in its application and result to bring it within the classification of direct taxes.

Pollock v. Farmers Loan & Trust Co., 157 U. S. 429, 158 U. S. 601; *Brushaber v. Union Pacific R. R. Co.*, 240 U. S. 1. In effect the taxation of revenue from property or, in fact, the taxation of any unescapable incident connected with the use and ownership of property is a taxation of the property itself. It is the revenue or use which gives to property its value, which is, in substance, the property itself. This was the basis of the decision in the Pollock case.

Under the laws of each of the four states involved the husband cannot receive dividends from corporate stocks which are part of the community, he cannot receive rents and revenues from real estate owned during the taxable year without there arising and accruing to his wife an equal sum. The income tax levied by the government in these cases is not only based upon the husband's share of such rents, revenues and dividends but also upon that share vested in her which is not income to him and not an incident to property owned by him.

There is in the present case an unavoidable demand, referred to in *Thomas v. U. S.*, 192 U. S. 363, 371, which is based upon something absolutely indispensable to any effective enjoyment of ownership, making it a direct property tax (see *Dawson v. Kentucky Dist. Corp.*, 255 U. S. 288) and so much of this basis as belongs to the wife is not appellee's income; the tax to that extent fails because exacted in a manner contrary to the Third clause of Section Two of Art. I, and the Fourth clause of Section 9 of Art. I of the Constitution.

(b) It Would Result in a Tax Not Geographically Equal and Uniform.

In all other states, except these community property states, the laws of property and ownership are recognized in the imposition of federal income taxes as indeed they have been in these four states prior to the institution of these suits. In those other states a husband and wife are permitted to make separate returns of the income which, under their own laws, they own. Thus, tenancies in common by the entireties, partnerships between husband and wife, business arrangements not constituting partnerships, trust agreements and many other forms of ownership have been examined and where the wife was found to be the owner of all or a part of the income, she was permitted to return and pay taxes thereon. This privilege, which the Constitution places upon the law, appellant denies to citizens of these states. We have, therefore, the exact situation which the present Attorney General referred to in his last opinion upon the subject,—a lack of geographical uniformity required by Section 8 of Art. I, of the Federal Constitution.

It may be urged, in opposition to our views as to want of uniformity, that the want of uniformity is not geographical but that the varying incidence of the tax in the various states is produced by the different legal systems in vogue and not by any illegal discrimination among states, or sections in the Revenue Act itself, but such an argument overlooks the point heretofore made that in all of those other states their legal systems have been given effect and ownership as determined by the laws of such states recognized as the basis for the imposition of the tax and

that in no such state have husband and wife been required to combine, for income tax purposes, separately owned income. As construed and applied, such artificial and arbitrary discrimination amounts to putting pressure upon community property states to conform their legal systems with that of other states, or suffer improper, unequal and unjustifiable burdens.

There is the same want of uniformity, even if we were to concede that in these states dominion or control of income is the test of to whom it shall be taxed. This has not been done in the non-community property states. In short, however considered, the tax is laid upon one basis in these states and upon another basis in other states.

(c) Such a Basis Would be so Arbitrary and Capricious as to Constitute Taking of the Property Without Due Process.

It is now well settled that a taxing act can be so arbitrary and capricious in its application, so wanting in proper classification or basis, as to constitute the taking of property without due process of law, within the purview of the Fifth Amendment.

It is this precise defect—the measuring of tax liability by the property of some one else as well as the taxpayer—which has caused other taxing laws to be held wanting in due process; and this, although the others occupied the same, or almost as close a relation to the taxpayer as does the wife to the taxpayer in each of these cases.

In *Knowlton v. Moore*, 178 U. S. 41, the Supreme Court considered taxes on legacies and inheritance imposed by the War Revenue Act of 1898. Among

other questions presented was the validity of the construction urged by the Government to the effect that the taxes were laid upon each individual legacy or inheritance, but that the rate was to be measured to some extent by the size of the gross estate and not by the size of the legacy or inheritance received by the individual taxpayer. The Court held that the law should not be so construed, saying:

> "But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth $1,000, may be taxed, but the rate of tax is to be determined by attributing to A's house the value of B's house which may be worth a hundred fold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated * * * It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person accompanied by an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising, from those fundamental conceptions of free Government which underlie all constitutional systems."

Again, in the case of *Lewellyn v. Frick*, 268 U. S. 238, the Government sought to measure the estate tax due from the estate of Henry C. Frick by adding to the value thereof the amounts of certain life insurance policies taken out by him on his life in favor of his wife and daughter. These policies were taken out long before the taxing act in question—the Revenue Act of 1918—was passed. That Act specified (Sec. 403) that there should be included in the gross estate:

"The excess over $40,000.00 of the amounts receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

The Court says:

"The defendants in error say that if these policies are covered by the statute, these sections show that the beneficiaries are taxed upon their own property under the guise of a tax upon the transfer of his estate by Mr. Frick, and that this is taking their property without due process of law,—citing *Re Pell*, 171 N. Y. 48, 57 L. R. A. 540, 89 Am. St. Rep. 791, 63 N. E. 789, and other cases. In view of their liability, the objection cannot be escaped by calling the reference to their receipts a mere measure of the transfer tax. The interest of the beneficiaries is established by statutes of the states controlling the insurance, and is not disputed. It also is strongly urged that the tax would be a direct tax. In view of our conclusion it is not necessary to state the position of the defendants in error more in detail.

"We do not propose to discuss the limits of the powers of Congress in cases like the present. It is enough to point out that at least there would be a very serious question to be answered before Mrs. Frick and Miss Frick could be made to pay a tax on the transfer of his estate by Mr. Frick. There would be another if the provisions for the liability of beneficiaries were held to be separable, and it was proposed to make the estate pay a transfer tax for property that Mr. Frick did not transfer. Acts of Congress are to be construed, if possible, in such a way as to avoid grave doubts of this kind."

In the still more recent case of *Nichols v. Coolidge,* 274 U. S. 531, decided May 31, 1927, the Supreme Court in the strongest terms denounced and held invalid such a method of determining tax liability. On July 29, 1907, Mrs. Coolidge and her husband conveyed certain real estate in Boston to trustees, who were to hold the same, with power of sale, and reinvestment for the benefit of the settlers or the survivor of them for life, and the trustees were then to distribute the corpus of the trust to the five children of Mr. and Mrs. Coolidge. On the death of Mrs. Coolidge, January 6th, 1921, the trustees held property worth $432,155.35, but much of the original corpus of the trust, through sale and reinvestment, had passed from their hands. The Government based its estate tax exaction on the value of the estate of the decedent, plus the sum of the property held by the trustees and other property not here material, and the suit was to recover so much of the tax as was based upon this sum. The Court pointed out that the plain terms of the statute required the inclusion, thus preventing a construction which would avoid the constitutional question, that it was admittedly not passed to prevent evasion of death duties, but applied to transactions like the one under consideration, undertaken when there was no tax to evade. The opinion continued:

> "Certainly Congress may lay an excise upon the transfers of property by death, reckoned upon the value of the interest which passes thereby. But under the mere guise of reaching something within its powers, Congress may not lay a charge upon what is beyond them. Taxes are very real things and statutes imposing them are estimated by practical results. * * *

"The statute requires the executors to pay an excise ostensibly laid upon transfer of property by death from Mrs. Coolidge to them, but reckoned upon its value plus the value of other property conveyed before the enactment in entire good faith and without contemplation of death. Is the statute, thus construed, within the power of Congress?

"Undoubtedly Congress may require that property subsequently transferred in contemplation of death be treated as part of the estate for purposes of taxation. This is necessary to prevent evasion and give practical effect to the exercise of admitted power, but the right is limited by the necessity.

"Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testimentary in character and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves $10.00, both that and the real estate become liable. Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died. See *Grew v. Bowers, Collector,* 12 Fed. (2) 625.

"This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. *Brushaber v. U. P. R. R. Co.,* 240

> U. S. 1, 24; *Barday & Co. v. Edwards*, 267 U. S. 442; see also *Knowlton v. Moore*, 178 U. S. 41, 77. And we must conclude that Section 402 (a) of the statute here under consideration, in so far as it requires that there shall be included in gross estate the value of property transferred by the decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after death is arbitrary, capricious and amounts to confiscation."

The cases of *Untermyer v. Anderson*, 276 U. S. 440, and *Blodgett v. Holden*, 275 U. S. 142, are other recent examples of taxation held in conflict with the Fifth Amendment because arbitrary and capricious.

The Supreme Court, in all of these cases, says in effect, that the house of A cannot be taxed upon a basis determined by the value of B's house; that such a tax is arbitrary, is capricious and amounts to confiscation. The holding is made despite the close relationship existing between the taxpayer and the person whose property is used as a measure of the tax. The situation is not changed because property, admittedly taxable, is used as a part of the basis. It does not save the situation to tax A upon the value of his house, plus the value of B's house. The latter must be entirely eliminated. Just as the Attorney General said in his brief in the *Robbins* case, the United States cannot compel the California wife to pay an income tax upon any share of the community income, because it was not hers, so we say that the Congress cannot lawfully compel the husband to pay an income tax on any part of the community income except his own, and it cannot compel him to pay on his own at higher rates, where the

laws of the state where he resides give his wife an equal ownership with him in the community property.

The foregoing argument as to constitutionality is based upon the proposition that this court will recognize that under the laws of the four states involved there vests in the wife one half of the community income in the taxable year 1927 as it accrued and that the Revenue Act of 1926 must be construed as taxing the husband upon a sum which results from combining the incomes of both husband and wife. The effect of the opinion is to greatly increase the tax on the aggregate income which tax is borne by the community estates of the husband and wife and to oblige the husband to pay the tax on both incomes as if the entire sum was his individual liability to the government and not a liability which was part his and part that of the wife. The constitutional power given Congress to tax, whether the taxation be direct or indirect, does not include the power to tax one person upon taxable property or taxable transactions of another person. To tax one person at progressive rates of taxation which are not based upon his own income but the sum resulting from adding to his income that which is vested in another effectively deprives the taxpayer of the property without due process of law. To tax husbands in community property states at progressive rates upon the sum of their income and the income of their wives while in other states husbands and wives are separately taxed upon the incomes vesting in each is such discrimination against husbands in community property states as to place upon them additional burdens beyond those laid upon husbands in other states and in violation of the Constitutional mandate that duties, imposts and

excises shall be uniform throughout the United States. If violation of Section 8 of Article 1 of the Constitution does not result from the foregoing hypothesis as to the entire income so taxed, nevertheless it must result as to so much of the income as is taxed indirectly in the form of an excise. If, under either hypothesis, the Federal Constitution is violated by such a construction of the Revenue Act, then such a construction must fall since it is not to be presumed that Congress intended to tax those incomes which are taxed directly by that Act and to exempt from taxation such incomes as are taxed indirectly by it. Since Congress has not undertaken by statute to define income but has merely taxed the income of each individual and has in fact rejected amendments offered which were designed to place such a construction upon the law, the conclusion is inescapable that no such result was intended.

Respectfully submitted,

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APPENDIX.

O. D. 426—Community Property in Texas and Washington.

13-20-815
O. D. 426

COMMUNITY PROPERTY IN TEXAS AND WASHINGTON.

A husband and wife may not divide the salary of the husband or of the wife for the purpose of reporting such salary in separate returns for income tax purposes.

Under the laws of Texas and Washington property owned by the husband or wife prior to marriage remains the separate estate of the owner. Accordingly income, such as rents and interest from such property, should be reported by the husband or wife separately after marriage.

The legal owners of community property (property acquired after marriage) in the States of Texas and Washington are the husband and wife jointly in equal shares, and the income accruing therefrom is the joint income of the husband and wife in which each is entitled to one-half. Such income may therefore be divided for income tax purposes and the husband and wife may each report in separate returns one-half thereof. This is held to be true notwithstanding that in law the husband is given the right to manage and control community property the same as his separate estate and that as regards personal property he and he alone may dispose of it. (Ruling 21-19-528; sec. 223, art. 401, modified.) (See, however, T. D. 3071; 39-20-1218.)

T. D. 3071—Containing Opinion of Attorney General Palmer dated August 24, 1926, Regarding Return of Community Property in Texas.

39-20-1218
T. D. 3071

INCOME TAX

Husband and wife—Community property—Opinion of Attorney General.

(1) The earnings of husband and wife domiciled in Texas are community income, and such husband and wife in rendering separate income-tax returns may each report as gross income one-half the total earnings of the husband and wife.

(2) The income from separate property, except the increase, rents and revenues from lands, is community income, and therefore husband and wife domiciled in Texas, in rendering separate income-tax returns, may each report as gross income one-half the total income from separate property, except the increase, rents and revenues from land held separately.

(3) The income from community property as defined in article 4622, Vernon's Sayles' Statutes, is community income, and therefore husband and wife domiciled in Texas, in rendering separate income tax returns, may each report as gross income one-half the total income from such community property.

DEPARTMENT OF JUSTICE,
Washington, August 24, 1920.

Hon. DAVID F. HOUSTON,
Secretary of the Treasury, Washington, D. C.

DEAR MR. SECRETARY: Further acknowledging receipt of your favor of August 12th, requesting my opinion on the three questions of law set forth below, to wit:

(1) Are the earnings of husband and wife domiciled in Texas community income, and may they therefore in rendering separate income tax returns, each report as gross income one-half of the total earnings of the husband and wife?

(2) Is the income from separate property, as defined in article 4621, Vernon's Sayles' Statutes, 1918 edition, community income, and may therefore husband and wife domiciled in Texas, in rendering sep-

arate income tax returns, each report as gross income one-half of the total income from all separate property owned by them?

(3) Is the income from community property as defined in article 4622, Vernon's Sayles' Statutes, 1914 edition, community income, and may therefore husband and wife domiciled in Texas, in rendering separate income tax returns, each report as gross income one-half of the total income from community property?

I have the honor to advise you as follows:

The Revenue Act of 1918 levies a tax on the net income of every individual (secs. 210 and 211). Net income is defined as gross income less deductions allowed (sec. 212). Gross income is defined as follows (sec. 213):

> That for the purposes of this title (except as otherwise provided in section 233) the term "gross income"—
>
> (a) Includes gains, profits, and income derived from salaries, wages, compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit or gains or profits and income derived from any source whatever. The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period.

The State Constitution of Texas provides:

> ART. VII, sec. 19. Constitution 1845: All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife in relation as well as to her separate property as that held with her husband. Laws shall also be passed providing for the registration of the wife's separate property.

The Statutes of the State of Texas determining property rights of husband and wife are as follows. Article 4622, Vernon's Sayles' Statutes, 1914 edition:

All property acquired by either the husband or wife during marriage, except that which is the separate property of either one or the other, shall be deemed the common property of the husband and wife, and during coverture may be disposed of by the husband only; provided, however, the personal earnings of the wife, the rents from the wife's real estate, the interest on bonds and notes belonging to her, and dividends on stocks owned by her shall be under the control, management, and disposition of the wife alone, subject to the provisions of article 4621, as hereinabove written; and further provided that any funds on deposit in any bank or banking institution, whether in the name of the husband or the wife, shall be presumed to be the separate property of the party in whose name they stand, regardless of who made the deposit, and unless said bank or banking institution is notified to the contrary, it shall be governed accordingly in honoring checks and orders against such account.

Article 4621, Vernon's Sayles' Statutes, 1918 edition:

All property, both real and personal, of the husband owned or claimed by him before marriage, and that acquired afterwards by gift, devise, or descent, as also the increase of all lands thus acquired, and the rents and revenues derived therefrom, shall be his separate property. The separate property of the husband shall not be subject to the debts contracted by the wife, either before or after marriage, except for necessaries furnished herself and children after her marriage with him. All property of the wife, both real and personal, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, as also the increase of all lands thus acquired, and the rents and revenues derived therefrom, shall be the separate property of the wife. During marriage the husband shall have the sole management, control, and disposition of his separate property, both real and personal, and the wife shall have the sole management, control, and disposition of her separate property, both real and personal; provided, however, the joinder of the husband in the manner now provided by law for conveyance of the separate real estate of the wife shall be necessary to an encumbrance or conveyance by the wife of her lands, and the joint signature of the husband and wife shall be necessary to a transfer of stocks and bonds belonging to her, or of which she may be given control by this Act; provided, also, that if the husband shall have permanently abandoned his wife, be insane, or shall refuse to join in such encumbrance, conveyance, or transfer of such property, the wife may apply to the district court of the county of her residence, and it shall be the duty of the court, in term time or vacation, upon satisfactory proof that such encumbrance, conveyance, or transfer would be advantageous to the interest of the wife, to make an order granting permission to make such encumbrance, conveyance, or

transfer without the joinder of her husband, in which event she may encumber, convey, or transfer said property without such joinder. Neither the separate property of the wife, nor the rents from the wife's separate real estate, nor the interest on bonds and notes belonging to her, nor dividends on stocks owned by her, nor her personal earnings, shall be subject to the payment of debts contracted by the husband. The homestead, whether the separate property of the husband or wife, or the community property of both, shall not be disposed of except by the joint conveyance of both the husband and the wife, except where the husband has permanently abandoned the wife, or is insane, in which instance the wife may sell and make title to any such homestead, if her separate property, in the manner herein provided for conveying or making title to her other separate estate.

The community property of the husband and wife shall not be liable for debts or damages resulting from contracts of the wife, except for necessaries furnished herself and children, unless the husband joins in the execution of the contract. Provided that her rights with reference to the community property on permanent abandonment by the husband shall not be affected by the preceding sentence.

Article 2469, Vernon's Sayles' Statutes:

Upon the dissolution of the marriage relation by death, all property belonging to the community estate of the husband and wife shall go to the survivor if there be no child or children of the deceased or their descendants; but if there be a child or children of the deceased or descendant of such child or children, then the survivor shall be entitled to one-half of said property, and the other half shall pass to such child or children or their descendants. But such descendants shall inherit only such portion of said property as the parent through whom they inherit would be entitled to if alive.

The community property system prevails in Texas, Arizona, California, Washington, Louisiana, and New Mexico. It seems to have had its origin in France and Spain and to have been brought thence into our judicial system.

Community property laws provide generally that all property acquired during marriage by the industry and labor of either husband or wife or both, together with the produce and increase thereof, belongs to both in equal shares during the continuance of the marital relation. It has its foundation in the fact or the legal presumption that all property acquired during marriage, otherwise than by gift, devise, or descent, is acquired by the joint efforts of husband and wife (*Nickerson v. Nickerson,* 65 Tex. 281, 284). Their relation

partakes of the nature of a partnership in which each partner may have separate estate or property as well as common stock of acquisitions and gains. The business of the firm generally is transacted in the name of the husband, and he prosecutes and defends its suits with the same effect as if his partner were named in the case (*Simpson v. Brotherton,* 62 Tex. 170); and although community property has not all the incidents of partnership property it has many of them, and is commonly spoken of as partnership property (*De Blanc v. Lynch & Co.,* 23 Tex. 25; *Wilkinson v. Wilkinson,* 20 Tex. 237). In the conventional partnerships the gains of the partners are in proportion to their respective shares of stock and services, but in the conjugal partnerships the division is equal, though one may have brought in the greater part, if not all, of the property from which the profits are derived, or may have contributed all his skill and services unaided by the other (*Wheat v. Owens,* 15 Tex. 241; *Routh v. Routh,* 57 Tex. 589, 595). The fact that one or the other of the spouses may do all the work does not change the character of community property (*Yates v. Houston,* 3 Tex. 452, 454). And though the management and disposal of community property during marriage are usually given to the husband, this is said to be for reasons of public policy and social economy, and not on the grounds that the husband has any greater interest in it than the wife. Section 4622, Vernon's Sayles' Statutes, as amended in 1913 and as set forth above, provides that the personal earnings of the wife, the rents from her estate, the interest on bonds and notes belonging to her, and dividends owned on stocks owned by her shall be under the control, management, and disposition of the wife alone; but the Supreme Court of Texas held, in *Tannehill v. Tannehill,* 171 S. W. 1050, that such amendment did not change the character of rents from the wife's separate property so as to make them her separate property, but that they continued to belong to the com-

munity estate, and the husband was owner of one-half of same. (This before the amendment of section 4621 in 1917 made the rents from separate lands the separate property of the owner of the land.)

In *Tucker v. Carr*, 39 Tex. 98, 102, the court said:

> It is well settled that all property acquired during the marriage, whether by the labor of the husband or the wife, or the joint labor of both, whether the title be made to the husband or to the wife or to both jointly, is community property.

Also see *Cooke v. Bremond*, 27 Tex. 457.

In *Holyoke v. Jackson*, 3 Pac. 841, the Supreme Court of Washington, in defining community property rights in that State, held that the community—

> Is like a partnership, in that some property coming from or through one or other or both of the individuals forms for both a common stock which bears the losses and receives the profits of its management, and which is liable for individual debts; but it is unlike in that there is no regard paid to proportionate contribution, service, or business fidelity; that each individual once in it is incapable of disposing of his or her interest, and that both are powerless to escape from the relationship, to vary its terms, or to distribute its assets or its profits. * * * In it the proprietary interest of husband and wife are equal, and those interests do not seem to be united merely, but unified.

There are numerous decisions holding that the proportional interests of husband and wife in community property are equal, regardless of their individual contributions.

In *Merrill v. Moore*, 104 S. W. 514, the court said:

> This community of interest is not made to depend upon the acquisition of the property during the time the parties actually live together nor upon the fact that there was an equal amount of labor or capital contributed by the husband and wife in its accumulation. It is the property acquired during the marriage (with exceptions stated) that "shall be deemed the common property of husband and wife, and the right to an equality of enjoyment and division thereof, regardless of whether the one or the other has contributed little or nothing to its acquisition," is well recognized.

Also see *Edwards v. Brown*, 68 Tex. 329; *Saunders v. Isbell*, 24 S. W. 307; *Barr v. Simpson*, 117 S. W.

1041; *Wright v. Hays' Admr.*, 10 Tex. 130; *Zimpelman v. Robb*, 53 Tex. 274.

That one-half of the common estate belongs to each spouse is recognized in Treasury Decision 2450, which determines the method of assessing estate tax upon the estate of a decedent spouse.

The decisions in the various States seem to be unaminous on the proposition that the earnings of both husband and wife during the marriage belong to the community.

In *Fennell v. Drinkhouse*, 131 Cal. 447, it was held that money earned by the wife while living with her husband was community property, the court saying:

> The possession of community property by the wife is the possession of the husband.

And in *Martin v. Southern Pacific Company*, 130 Cal. 285, holding that moneys received as damages for injury to the wife are community property, it was said:

> The services of the wife are a part of the earning power of the community, and the earnings received for her services constitute community property as much as do the earnings received for the services of the husband. If the injury had been received by the husband, it would not be contended that he could not recover for the damage sustained by the loss of his earning capacity. In either case the earnings would be community property, and any act by which either husband or wife is deprived of the capacity to render services diminishes the capacity to accumulate community property. If the services voluntarily rendered by the wife obviate the necessity of employing other assistance, the amount of the community property is thereby enhanced in the amount that would be required for such assistance * * *.

See also *Washburn v. Washburn*, 9 Cal. 475.

Under the Louisiana statutes the profits of the industry of both spouses and the fruits of their separate estates fall into the community. *Succession of Webre*, 49 La. 1491; 22 So. 390; *Knight v. Kaufman*, 105 La. 35; 29 So. 711; *Manning v. Burke*, 107 La. 456; 31 So. 862.

The decisions of the Supreme Court of the State

of Washington are to the same effect. *Abbott v. Weatherby,* 6 Wash. 507; 33 Pac. 1070; *Yake v. Pugh,* 13 Wash. 78; 42 Pac. 528; *Sherlock v. Denny,* 28 Wash. 170; 68 Pac. 452.

There are numerous decisions by the Supreme Court of Texas holding that in Texas the earnings of the husband and wife are community property. *Cline v. Hackbarth,* 27 Tex. Civ. App. 391; 65 S. W. 1086; *Johnson v. Burford,* 39 Tex. 242; *Pearce v. Jackson,* 61 Tex. 642; *Cooke v. Bremond,* 27 Tex. 457.

In the latter case the court said:

> Our whole system of marital rights is based upon the fact that acquisitions either of the joint or separate labor or industry of the husband or wife become common property; and as a general rule deducible from this principle, all property acquired by purchase or apparent onerous title, whether the conveyance be in the name of the husband or of the wife, or in the names of both, is *prima facie* presumed to belong to the community.

Under the laws of the various States wherein the community property system obtains the earnings of separate property of the spouses, with such exceptions as are specifically provided for by statute, are community property. See *Barr v. Simpson,* 117 S. W. 1040 (Tex.), and *Hayden v. McMillan,* 23 S. W. 430 (Tex.).

The latter case was decided when article 2851, Revised Statutes of Texas, provided that all the property owned by the wife before marriage or acquired afterwards by gift, devise, or descent, and the "increase of all lands thus acquired" should be the separate property of the wife. And the court held that rents accruing on the separate lands of the wife were community property and subject to garnishment for community debts. This case also establishes the proposition that such community interest attaches the moment the property comes into existence, the court saying:

> The moment the rents become due they are disconnected from the land and become personal property, and, being acquired by the joint labors of the married couple put forth during the marital relation, they must necessarily be community.

From the above authorities, I am convinced that under the law of Texas the earnings of the husband and wife belong to them jointly in equal shares; that the community interest attaches as soon as the right to the wages comes into existence; and that the increase and revenues from the separate property of each spouse, except the increase, rents, and revenues from lands, is also community property in which the interests of husband and wife are equal.

These propositions being established, it follows that the earnings of husband and wife and the revenues from their separate personal property are community "income" under the provisions of the Act of February 24, 1919. Gross income under the terms of the Act includes—

> Gains, profits, and income derived from salaries, wages, compensation for personal services of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property.

The law of Texas presumes that the earnings of the husband and wife are the product of their joint labor and rests the ownership of same in the community; they are therefore community "income," to wit: "Gain, profits, and income" of the community, "derived from salaries, wages, compensation for personal services, * * * professions, vocations," as the case may be.

Under the Statutes of Texas heretofore set forth the separate property of the spouses is defined as that—

> Owned or claimed by him (or her) before marriage, and that acquired afterwards by gift, devise, or descent,

and also—

> The increase of all lands thus acquired, and the rents and revenues derived therefrom.

It is to be noted that the increase of separate personal property and the revenues derived therefrom are not the separate property of the owner of

the personalty, but are community property (*Carr v. Tucker,* 42 Tex., 330; *Epperson v. Jones,* 65 Tex., 425; *Barr v. Simpson,* 117 S. W., 1041). They are therefore "income" to the community, to wit: "Gains, profits, and income * * * from businesses, commerce, or sales or dealings in property * * * growing out of the ownership or use of or interest in such property."

Since one-half of all community property vests in each spouse it follows that one-half of the increase and revenues from separate property of the spouses, except increase and rents and revenues from lands, is income to each of said spouses.

Community property, under the laws of Texas, belongs jointly to husband and wife; it follows that the income therefrom accrues to husband and wife in equal shares. I therefore conclude:

1. That the earnings of husband and wife domiciled in Texas are community income, and such husband and wife, in rendering separate income tax returns, may each report as gross income one-half the total earnings of the husband and wife.

2. That the income from separate property, except the increase, rents, and revenues from lands, is community income, and that therefore husband and wife domiciled in Texas, in rendering separate income tax returns, may each report as gross income one-half the total income from separate property, except the increase, rents, and revenues from land held separately.

3. That the income from community property as defined in article 4622, Vernon's Sayles' Statutes, quoted above, is community income, and that therefore husband and wife domiciled in Texas, in rendering separate income tax returns, may each report as gross income one-half the total income from such community property.

Respectfully,

A. Mitchell Palmer.
Attorney General.

T. D. 3138—Containing Opinion of Attorney General Palmer dated February 26, 1921, Regarding Separate Return of Community Incomes in States Other Than Texas.

11-21-1515
T. D. 3138

1. INCOME TAXES—HUSBAND AND WIFE—COMMUNITY PROPERTY.

In Washington, Arizona, Idaho, New Mexico, Louisiana, and Nevada the husband and wife domiciled therein, in rendering separate income tax returns, may each report as gross income one-half of the income which under the laws of the respective States becomes, simultaneously with its receipt, community property; this is not based upon any statute enacted subsequent to March 1, 1913, and applies under income tax Acts prior to the Revenue Act of 1918.

2. ESTATE TAX—HUSBAND AND WIFE—COMMUNITY PROPERTY.

In Washington, Arizona, Idaho, New Mexico, Louisiana, and Nevada there should be included in gross estate, in computing the estate tax of a deceased spouse, one-half only of the community property of husband and wife domiciled therein; this is not based upon any statute enacted subsequent to March 1, 1913, and applies under estate tax Acts to the Revenue Act of 1918.

TREASURY DEPARTMENT,

OFFICE OF COMMISSIONER OF INTERNAL REVENUE,

Washington, D. C.

To Collectors of Internal Revenue and others concerned:

There is given below in full for your information and guidance an opinion rendered by the Attorney General under date of February 26, 1921, dealing with the right of husband and wife domiciled in certain States having so-called "community property" laws to divide certain of their income for the purpose of the income tax, and as to the inclusion of community property in the gross estate of a deceased spouse.

See, in this connection, Treasury Decision No. 3071. (C. B. 3, p. 221.)

WM. M. WILLIAMS,
Commissioner of Internal Revenue.

Approved: March 3, 1921.

D. F. HOUSTON,
Secretary of the Treasury.

DEAR MR. SECRETARY:

My opinion has been requested upon the following questions:

1. In which of the States, other than Texas, in which the community property system exists may a husband and wife domiciled therein, in rendering separate income tax returns, each report as gross income one-half of the income which under the laws of such State becomes, simultaneous with its receipt, community property?

2. In which of the States in which the community property system exists should there be included in gross estate, in computing the estate tax of the estate of a deceased spouse, one-half and only one-half of the community property of husband and wife domiciled therein?

3. If your answers to questions 1 and 2 as to any State are based upon a statute enacted subsequent to March 1, 1913, please give the rule as to such State existing from March 1, 1913, to the passage of such statute, for my guidance in allowing claims for refund.

4. Do your answers to questions 1 and 2 apply under income and estate tax Acts prior to the Revenue Act of 1918?

The community property system prevails in Arizona, California, Idaho, Louisiana, Nevada, New Mex-

ico, Texas and Washington. The application of the income tax Act to the income from community property belonging to husband and wife domiciled in Texas was disposed of in my opinion of September 10, 1920.

The significant portions of the Arizona statutes bearing upon the community property system in that State, all of which except article 1100 were enacted prior to 1913, are:

ART. 3850. All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise, or descent, or earned by the wife and her minor children while she has lived or may live separate and apart from her husband, shall be deemed the common property of the husband and wife, and during the coverture personal property may be disposed of by the husband only; but husband and wife must join in all deeds and mortgages affecting real estate except unpatented mining claims, which may be conveyed by the husband or wife only, as provided by the laws of this State relating to conveyances; provided that either husband or wife may convey or mortgage separate property without the other joining in such conveyance or mortgage.

ART. 1100. Upon the death of the husband one half of the community property shall go to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes to his descendants equally, if such descendants are of the same degree of kindred to the decedent, otherwise according to the right of representation; and in the absence of both such distribution and such descendants is subject to distribution in the same manner as the separate property of the husband. Upon the death of the wife one half of the community property shall go to the surviving husband and the other half is subject to the testamentary disposition of the wife, and in the absence of such disposition goes to the descendants equally, if such descendants are of the same degree of kindred to the decedent, otherwise according to the right of representation, and in the absence of both such distribution and such descendants is subject to distribution in the same manner as the separate property of the husband.

ART. 2061. No conveyance, transfer, mortgage, or incumbrance of any real estate which is the common property of husband and wife, or any interest therein, shall be valid unless such conveyance, transfer, mortgage, or incumbrance shall be executed and acknowledged by both the husband and wife. But the provisions of this section shall not apply to unpatented mining claims, which may be conveyed, transferred, mortgaged, or incumbered by the one in whose name the title or right of possession of any such mining claim may be without the other joining in such conveyance, transfer, mortgage, or incumbrance.

ART. 3848. All property, both real and personal, of the husband owned or claimed by him before marriage and that acquired afterward by gift, devise, or descent, as also the increase, rents, issues, and profits of the same, shall be his separate property, and all property,

both real and personal, of the wife owned or claimed by her before marriage and that acquired afterward by gift, devise, or descent, as also the increase, rents, issues, and profits of the same, shall be her separate property.

Prior to 1913, article 1100 read:

Upon the dissolution of the marriage relation by death all the common property belonging to the community estate of the husband and wife shall go to the survivor if the deceased have no child or children; but if the deceased have a child or children, his survivor shall be entitled to one half of said property, and the other half shall pass to the child or children.

The Supreme Court of the State of Arizona has held these statutes establish in the wife an equal interest with the husband in community property in that State. In the case of *La Tourette v. La Tourette*, 15 Ariz. 200 (1914), the court said, after reviewing the statutes above set forth:

The law makes no distinction between the husband and wife in respect to the right each has in the community property. It gives the husband no higher or better title than it gives the wife. It recognizes a marital community wherein both are equal. Its policy plainly expressed is to give the wife in this marital community an equal dignity, and make her an equal factor in matrimonial gains.

* * * * * * * * * *

That the interest of the wife in the community property during the coverture is not a mere possibility—not the expectancy of an heir—is quite apparent. The old saying is not true that community is a partnership which begins only at its end. Upon the dissolution of the community by death, the wife does not inherit her share of the common property, but with the death of the husband the management and control of the statutory agent or trustee ceases. The wife acquires not her share, for that was already hers, but in addition to her share she acquires the right of management, control, and disposition of that share, her status being thereby fixed as that of a *feme sole*. If there be no child or children of the deceased husband, all of the common property goes to the surviving wife. She has her share in the property, and in addition, by right of survivorship and not as an heir, she acquires the share that belonged to the husband, and she takes all of the property in her own right, and with respect to the management, control, and disposition of such property is reduced to the status of a *feme sole* and must thenceforward with respect to it act for herself.

The Idaho law provides, article 4656 of the compiled Statutes of 1919, that all property of the wife

owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, or that which she shall acquire with the proceeds of her separate property, shall remain her sole and separate property to the extent and with the same effect as the property of her husband similarly acquired.

Article 4659 defines the separate property of the husband to be all property owned by him before marriage, and that acquired by gift, bequest, devise, or descent. Community property is defined as—

> All other property acquired after marriage by either husband or wife, including the rents and profits of the separate property of the husband and wife * * * unless by the instrument by which any such property is acquired by the wife it is provided that the rents and profits thereof be applied to her sole and separate use; in which case the management and disposal of such rents and profits belong to the wife, and they are not liable for the debts of the husband.

By article 4666—

> The husband has the management and control of the community property except the earnings of the wife for the personal services and the rents and profits of her separate estate. But he can not sell, convey, or encumber the community real estate unless the wife join with him in executing and acknowledging the deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered.

This section, which was amended in 1915 to read as above, previously and by amendment in 1913, provided:

> The husband has the management and control of the community property, but he shall not sell, convey, or encumber community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and by his wife.

A new provision of the law of 1915, article 4667, reads:

> The wife has the management and control of the earnings for her personal services, and the rents and profits of her separate estate.

On the death of either husband or wife it is provided by article 7803, that—

One-half of all the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife in favor only of his, her, or their children, or a parent of either spouse, subject also to the community debts, provided that not more than one-half of the decedent's half of the community property may be left by will to a parent or parents. In case no such testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall go to the survivor, subject to the community debts, the family allowance and the charges and expenses of administration: *Provided, however,* That no administration of the estate of the wife shall be necessary if she dies intestate.

Section 5713, as previously enacted in 1907, provided:

Upon the death of either husband or wife one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her share of the community property it shall descend equally to the legitimate issue of his, her, or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall all pass to the survivor to the exclusion of collateral heirs, subject to the community debts, the family allowance, and the charges and expenses of administration.

In *Ewald v. Hufton*, 31 Idaho, 373 (173 Pac., 247), decided in 1918, the Supreme Court of Idaho said that under the laws of Idaho no distinction is made between husband and wife as to the degree, quantity, nature, or extent of the interest each has in community property, and held that upon the dissolution of the community by the death of either spouse the survivor becomes tenant in common with the heirs of the deceased member, and the survivor can not convey title to the half belonging to the heirs which descended to them from the deceased spouse. It was therein decided that after the death of the wife a conveyance by the surviving husband conveys title only to his half.

In *Kohny v. Dunbar*, 21 Idaho 258 (121 Pac. 544), decided in 1912, the Supreme Court of Idaho fully con-

sidered the respective interests of husband and wife. This was a case where it was attempted, after the death of the husband, to levy an inheritance tax under the Idaho inheritance tax law upon the wife's half of the community property. The court held that section 5713, Revised Statutes of Idaho, as amended in 1907, in force at the time of the death of Kohny recognized the husband and wife as equal partners in the community estate and authorized each to dispose of his or her half by will, and that the survivor on the death of one spouse, merely continued to hold as owner one-half of the community property subject to the payment of community debts, saying:

> This statute clearly and unmistakably provides that the surviving spouse takes his or her half of the community property, not by succession, descent, or inheritance, but as survivor of the marital community or partnership. The same section provides further that in the event there be no issue of the marriage living at the time of the death of one of the spouses and he or she leaves no will or testament, the half of the community property which belonged to the deceased shall go to the survivor as an heir, and therefore, by descent and under and by virtue of the intestate laws of the State.
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> * * * * * * * * * *
>
> Since the interests of both husband and wife are the same and equal in and to the community property, and each takes one-half interest therein by will, it is clear to us that if the wife must pay an inheritance tax on her half of the property upon the death of the husband, that the husband would likewise be obliged to pay an inheritance tax on his half of the property on the death of his wife. The law clearly places them both on an equality in this respect. This illustration, however, accentuates the unreasonableness of the contention, for no one claims that the husband is required to pay such tax on his interest in the community estate.
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> * * * * * * * * * *
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> We conclude that upon the death of husband or wife the survivor takes one-half of the property in his or her own right as survivor and is not liable under section 1873 (Inheritance Tax Act) to pay an inheritance tax on such interest in the community estate.

The significant portions of the laws of Louisiana bearing on the questions before us are found in the following articles of the Revised Civil Code:

> ART. 915. In all cases, when either husband or wife shall die, leaving no descendants nor ascendants, and without having disposed, by last will and testament, of his or her share in the community prop-

erty, such undisposed of share shall be inherited by the survivor in full ownership.

ART. 916. In all cases, when the predeceased husband or wife shall have left issue of the marriage with the survivor, and shall not have disposed, by last will and testament, of his or her share in the community property, the survivor shall hold a usufruct, during his or her natural life, so much of the share of the deceased in such community property as may be inherited by such issue. This usufruct shall cease, however, whenever the survivor shall enter into a second marriage.

Article 915 was amended in 1920 to read as follows:

When either husband or wife shall die, leaving neither a father nor mother nor descendants, and without having disposed by last will and testament of his or her share of the community property, such undisposed of share shall be inherited by the surviving spouse in full ownership. In the event the deceased leave descendants his or her share in the community estate shall be inherited by such descendants in the manner provided by law. Should the deceased leave no descendants, but a father and mother (or either), then the share of the deceased in the community estate shall be divided in two equal portions, one of which shall go to the father and mother or the survivor of them, and the other portion shall go to the surviving spouse.

ART. 2332. The partnership, or community of acquets or gains, needs not be stipulated; it exists by operation of law, in all cases where there is no stipulation to the contrary.

But the parties may modify or limit it; they may even agree that it shall not exist.

ART. 2334. The property of married persons is divided into separate property and common property.

Separate property is that which either party brings into the marriage, or acquires during the marriage by inheritance or by donation made to him or her particularly.

Common property is that which is acquired by the husband and wife during marriage, in any manner different from that above declared.

ART. 2385. The paraphernal property, which is not administered by the wife separately and alone, is considered to be under the management of the husband.

ART. 2386. When the paraphernal property is administered by the husband, or by him and the wife indifferently, the fruits of this property, whether natural, civil, or the result of labor, belongs to the conjugal partnership, if there exists a community of gains. If there do not, each party enjoys, as he chooses, that which comes to his hands, but the fruits and revenues which are existing at the dissolution of the marriage belong to the owner of the things which produce them.

ART. 2399. Every marriage contracted in this State superinduces of right partnership or community of acquets or gains, if there be no stipulation to the contrary.

ART. 2402. The partnership or community consists of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce

of the reciprocal industry and labor of both husband and wife, and of the estates, which they may acquire during the marriage, either by donations made jointly to them both, or by purchase, or in any other similar way, even although the purchase be only in the name of the two and not of both, because in that case the period of time when the purchase is made is alone attended to, and not the person who made the purchase.

ART. 2404. The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.

He can make no conveyance *inter vivos*, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage.

Nevertheless he may dispose of the movable effects by a gratuitous and particular title, to the benefit of all persons.

But if it should be proved that the husband has sold the common property, or otherwise disposed of the same by fraud, to injure his wife, she may have her action against the heirs of her husband, in support of her claim in one-half of the property, on her satisfactorily proving the fraud.

ART. 2406. The effects which compose the partnership or community of gains are divided into two equal portions between the husband and the wife, or between their heirs, at the dissolution of the marriage; and it is the same with respect to the profits arising from the effects which both husband and wife brought reciprocally in marriage, and which have been administered by the husband, or by husband and wife conjointly, although what has been thus brought in marriage by either the husband or the wife, be more considerable than what has been brought by the other, or even although one of the two did not bring anything at all.

These statutes were all enacted prior to 1913 except article 915 which was amended in 1916 and again in 1920. The latter amendments provide for the succession of the deceased spouse's half of the community property when such spouse dies without disposition of such interest by will.

Up to 1907, with a few exceptions, the courts of Louisiana appear to have generally adhered to the view that the wife's interests in the community property is that of an expectant heir, and that she has no vested interest therein until the dissolution of the community. But in the Succession of Marsal, 118 La. 211 (1907), it is held that the wife did not take either her one-half of the community property nor the usufruct of her husband's one-half as heir

(art. 916) and that she was not therefore compelled to pay an inheritance tax on either under the inheritance tax law of Louisiana, saying:

> It is true that the right of usufruct which is vested in the surviving spouse is defeasible at the will of the deceased, but it is, nevertheless, a right conferred by the law, which enters into and forms a part of the marriage contract, and, of which the survivor can be deprived by no one save the deceased spouse, and it seems to us hardly correct to say that the surviving spouse necessarily takes the usufruct by inheritance from the deceased, because the latter has not made a testamentary disposition to the contrary.

In the Succession of May, 120 La. 691 (1908), it was held on the other hand that where a deceased wife had by will bequeathed her one-half interest in the community property to her husband, the husband must pay an inheritance tax on such share after community debts had been deducted from the whole.

The principle that the rights of husband and wife in the partnership's gains grow out of the marriage contract and do not originate at its dissolution was expounded by the court in *Dixon v. Dixon's Executors*, 4 La. 188 (1831), where it was said that the wife has rights in the acquets before the husband dies and that the objection confounds the power of the husband to defeat the wife's rights with the existence of such rights.

In *Beck v. Natalie Oil Co.*, 143 La. 154 (1918), the court said:

> The property involved in this suit was acquired by the father of plaintiffs while the community of acquets and gains existed between him and the mother of the plaintiffs, and the mother of the plaintiffs, as partner in community, became owner of one-half of it. This half the plaintiffs inherited from their mother, subject to the payment of the debts of the community.

In New Mexico the following statutes, enacted in 1907 or prior thereto, define the respective rights of husband and wife in that State:

> SEC. 2757. All property of the wife owned by her before marriage and that acquired afterwards by gift, bequest, devise or

descent, with the rents, issues and profits thereof is her separate property. The wife may without the consent of her husband convey her separate property.

SEC. 2758. All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise or descent, with the rents, issues and profits thereof is his separate property.

SEC. 2764. All other property acquired after marriage by either husband or wife, or both, is community property; but whenever any property is conveyed to a married woman by an instrument in writing the presumption is that title is thereby vested in her as her separate property. And if the conveyance be to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her, as tenant in common unless a different intention is expressed in the instrument, and the presumption in this section mentioned, is conclusive in favor of a purchaser or incumbrancer in good faith and for a valuable consideration. And in cases where married women have conveyed or shall hereafter convey, real property which they acquired prior to March 18, 1907, the husband, or their heirs or assigns, of such married women, may be barred from commencing or maintaining any action to show that said real property was community property, or to recover said real property, as follows: As to conveyances hereafter made from and after one year from the filing for record in the county clerk's office of such conveyances respectively.

SEC. 2766. The husband has the management and control of the community property, with the like absolute power of disposition, other than testamentary, as he has of his separate estate: *Provided, however*, That he can not make a gift of such community property, or convey the same without a valuable consideration, unless the wife, in writing, consent thereto, and *Provided, also*, That no sale, conveyance, or incumbrance of the homestead, which is then and there being occupied and used as a home by the husband and wife, or which has been declared to be such by a written instrument signed and acknowledged by the husband and wife and recorded in the county clerk's office of the country, and furniture, furnishings, and fittings of the home, or of the clothing and wearing apparel of the wife or minor children, which is community property, shall be made without the written consent of the wife.

SEC. 2767. Whenever the husband is *non compos mentis* or has been convicted of a felony and sentenced to imprisonment for a period of more than one year or has abandoned his wife and family, and left her and his family, if they have children, without support or is an habitual drunkard or for any other reason is incapacitated to manage and administer the community property the wife may present a petition duly verified to the district court of the county wherein any of the community property is located or situated, stating the name of her husband, a description of all community property, both real and personal, and the facts which render him incapacitated to manage and administer the community property and praying that she be substituted for her husband, as the head of said community, with the same power of managing, ad-

ministering, and disposing of the community property, as is vested in the husband by this chapter.

SEC. 2770. Upon the hearing of the petition so filed by the wife the court shall render judgment therein, either dismissing said petition or adjudging the wife thereafter to be the head of said community, with full power of managing, administering, and disposing of the community property, either real or personal, with such limitation therein as to the court may appear to be in furtherance of justice.

SEC. 2774. Whenever husband and wife shall have permanently separated and no longer live or cohabit together as husband and wife, either may institute suit in the district court for a division of property, or for the disposition of the children, without waiting for or obtaining in said suit a dissolution of the bonds of matrimony; * * *.

SEC. 2781. The failure to divide the property on divorce shall not affect the property rights of either the husband or wife; either may subsequently institute and prosecute a suit for division and distribution thereof, or with reference to any other matter pertaining thereto which could have been litigated in the original suit for divorce.

SEC. 1840. Upon the death of the wife the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her by a judicial decree for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition, goes to her descendants, or heirs, exclusive of her husband.

SEC. 1841. Upon the death of the husband one half of the community property goes to the surviving wife and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes one-fourth to the surviving wife and the remainder in equal shares to the children of the decedent and further as provided by law. In the case of the dissolution of the community by the death of the husband the entire community property is equally subject to his debts, the family allowance, and the charge and expenses of administration.

Section 2766 was amended in 1915 to read as follows:

The husband has the management and control of the personal property of the community, and during coverture the husband shall have the sole power of disposition of the personal property of the community, other than testamentary, as he has of his separate estate; but the husband and wife must join in all deeds and mortgages affecting real estate: *Provided*, That either husband or wife may convey or mortgage separate property without the other joining in such conveyance or mortgage; and, *Provided further*, That any transfer or conveyance attempted to be made of the real property of the community by either husband or wife alone shall be void and of no effect.

In the recent case of *Beals v. Ares*, 185 Pac. 780 (1919), the Supreme Court of New Mexico carefully reviewed the history of the community property system in New Mexico, arriving at the following conclusions:

(1) That under the law in this jurisdiction the wife's interest in the community property is equal with that of the husband; that, while he is by statute made the agent of the community and given dominion and control over the community property during the continuance of the marriage relation, his interest in the property by reason of such fact is not superior to that of his wife.

(2) That the wife does not forfeit her interest in the community property by the commission of adultery.

(3) That there is no statute in this State conferring upon the district court the power to divide the community property between the parties at its discretion; that, while it has power to divide the property, this power does not extend further than to set apart to each of the spouses their undivided half interest in the property.

(4) That the district courts have the power in all cases to set apart such portion of the community property or of the property of the respective spouses as in its discretion may be necessary for the proper support, care, and maintenance of the children born as a result of the marriage.

The conclusion of the court that the interest of husband and wife in community property are equal is based upon the provisions of section 2774 and 2781; the former, the court says:

Clearly recognizes an existing, present interest in the wife during the existence of the matrimonial status: * * *. Section 7481 recognizes that this interest continues even after divorce, where the property is not divided by the decree in the divorce case. Now, if she had no interest in the property during the existence of the community, but simply an expectancy which would ripen into an interest only upon the death of the husband, and which expectancy continued only during the existence of the marital status, this expectant interest would be cut off by the divorce decree * * *.

* * * The sections referred to clearly recognize a present interest in the wife, and the whole act shows that she was an equal partner with her husband in the matrimonial gains. He was constituted by section 16, c. 37, Laws 1907, as the agent or manager of the community property, but this did not vest him with the larger or superior interest in the property upon division.

In Nevada the relative rights of husband and wife in community property are defined in the following sections of the Revised Laws of that State:

SEC. 2155. All property of the wife owned by her before marriage, and that acquired by her afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property; and all property of the husband, owned by him before marriage, and that acquired by him afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property.

SEC. 2156. All other property acquired after marriage, by either husband or wife or both, except as provided by sections 14 and 15 of this Act, is community property.

SEC. 2160. The husband shall have the entire management and control of the community property, with the like absolute power of disposition thereof, except as hereinafter provided, as of his own separate estate: *Provided*, That no deed of conveyance or mortgage of a homestead as now defined by law, regardless of whether a declaration thereof has ben filed or not, shall be valid for any purpose whatever unless both the husband and wife execute and acknowledge the same as now provided by law for the conveyance of real estate: *Provided further*, That the wife shall have the entire management and control of the earnings and accumulations of herself and her minor children living with her, with the like absolute power of disposition thereof, when said earnings and accumulations are used for the care and maintenance of the family.

SEC. 2164. Upon the death of the wife the entire community property belongs without administration, to the surviving husband, except that in case the husband shall have abandoned his wife and lived separate and apart from her without such cause as would have entitled him to a divorce, the half of the community property subject to the payment of its equal share of the debts, chargeable to the estate owned in community by the husband and wife, is at her testamentary disposition in the same manner as her separate property, and in the absence of such disposition goes to her descendants equally, if such descendants are in the same degree of kindred to the decedent; otherwise, according to the right of representation; and in the absence of both such disposition and such descendants, goes to her other heirs at law, exclusive of her husband.

SEC. 2165. Upon the death of the husband one-half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes to his surviving children, equally, and in the absence of both such disposition and surviving children, the entire community property belongs without administration to the surviving wife except as hereinafter provided, subject, however, to all debts contracted by the husband during his life that were not barred by the statute of limitations at the time of his death: *Provided, however*, That the homestead set apart by the husband and wife, or either of them before his death, and such other property as may be exempt by law from execution or forced sale, shall be set apart for the use of the widow and minor heirs, and if no minor heirs, for the use of the widow. In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance and charges and expense of administration:

Provided, however, That if in the absence of said testamentary disposition the surviving wife and children, and in the absence of such children the wife shall pay or cause to be paid all indebtedness legally due from said estate, or secure the payment of the same to the satisfaction of the creditors of said estate, then and in such case the said community property shall not be subject to administration.

Section 2166 provides that on dissolution of the marriage on divorce the community property must be equally divided between the parties, except that in case of divorce for adultery or extreme cruelty the guilty party is entitled to only so much thereof as the court may allow. All of the above sections, except 2160, which was amended in 1917, were enacted prior to 1913.

One of the most recent and comprehensive decisions of the Supreme Court of Nevada, interpreting the above statutes and defining the interests of husband and wife in community property, is In re Williams, 40 Nev. 241, rendered in 1916. In that case it was sought to collect a tax under the Nevada inheritance tax act of 1913 on the one-half of the community property which passed to the wife on the death of the husband. But the court, after a careful review of the decisions and the constitution of the State, which provided in section 31 of article 4, that "laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property, *as to that held in common with her husband,*" said:

> It may, we think, be asserted, supported by the great weight of authority, that the interest of the wife in the community property and her title thereto is no less than that held by the husband, and this interest and title in the wife is not to be regarded as a mere expectancy.
>
> Concluding, as we do, that the wife's interest in the community property goes to her, not by succession or inheritance, but rather by a right vested in her at all times during marriage, it follows that it is not subject to the law of inheritance tax.

The respective rights of the husband and wife in the community property of the State of Washington

are defined by the following sections of Pierce's Washington Code of 1919, all of which were enacted prior to 1913:

SEC. 1424. The property and pecuniary rights of every married woman at the time of her marriage or afterwards acquired by gift, devise, or inheritance, with the rents, issue, profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber, or devise by will such property to the same extent and in the same manner that her husband can, property belonging to him.

SEC. 1428. A wife may receive the wages of her personal labor, and maintain an action therefor, in her own name and hold the same in her own right, and she may prosecute and defend all action at law for the preservation and protection of her rights and property as if unmarried.

SEC. 1432. Property and pecuniary rights owned by the husband before marriage and that acquired by him afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber, or devise by will such property without the wife joining in such management, alienation, or encumbrance as fully and to the same effect as though he were unmarried.

SEC. 1433. Property not acquired or owned, as prescribed in sections 2400 and 2408, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the mangement and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.

SEC. 1434. The husband has the management and control of the community real property, but he shall not sell, convey, or encumber the community real estate unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife: *Provided, however,* That all such community real estate shall be subject to the liens of mechanics and others for labor and materials furnished in erecting structures and improvements thereon as provided by law in other cases, and to liens of judgments recovered for community debts, and to sale on execution issued thereon.

SEC. 1435. Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts.

SEC. 1436. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property it shall descend equally to the legitimate issue of his, her, or their bodies. If there be no issue of said deceased living or none of their representatives living, then the said com-

munity property shall all pass to the survivor, to the exclusion of collateral heirs, subject to the community debts, the family allowance, and the charges and expenses of administration.

It appears to be the settled law of that State that the wife has, during coverture, as well as upon the dissolution of the marriage, a vested and definite interest and title in community property, equal in all respects to the interest and title of her husband therein. Leading cases are: *Holyoke v. Jackson*, 3 Wash. T. 235; *Mabie v. Whittaker*, 39 Pac. 172; *Marston v. Rue*, 92 Wash. 129 (159 Pac. 111); *Schramm v. Steele*, 166 Pac. 634 (97 Wash. 309); *Huyvaerts v. Roedtz*, 178 Pac. 801.

The statutes of California defining the relative property rights of husband and wife are found in the following sections of the Civil Code:

SEC. 162. All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property.

SEC. 163. All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property.

SEC. 164. All other property acquired after marriage by either husband or wife, or both, *including real property situated in this State, and personal property wherever situated, acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State*, is community property; but wherever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. And in case the conveyance is to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her, as tenant in common, unless a different intention is expressed in the instrument, and the presumption in this section mentioned is conclusive in favor of a purchaser or encumbrancer in good faith and for a valuable consideration. And in cases where married women have conveyed, or shall hereafter convey, real property which they acquired prior to May nineteenth, one thousand eight hundred eighty-nine, the husband, or their heirs or assigns, of such married women, shall be barred from commencing or maintaining any action to show that said real property was community property, or to recover said real property, as follows: As to conveyances heretofore made, from and after one year from the date of the taking effect of this act;

and as to conveyances hereafter made, from and after one year from the filing for record in the recorder's office of such conveyances, respectively.

SEC. 172. The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate: *Provided, however,* That he can not make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife.

SEC. 172a. The husband has the management and control of the community real property, but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered: *Provided, however,* That the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate.

SEC. 1401. Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her by judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition, goes to her descendants, or heirs, exclusive of her husband.

SEC. 1402. Upon the death of the husband, one half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his descendants, equally, if such descendants are in the same degree of kindred to the decedent; otherwise, according to the right of representation; and in the absence of both such disposition and such descendants is subject to distribution in the same manner as the separate property of the husband. In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration.

Sections 164 and 172 were amended to read as above in 1917, and 172a was then added. The changes in sec. 164 then made are underlined (italics). Prior to 1917 sec. 172 applied to all the community property and was amended only by the insertion of the word "personal." Section 172a imposes a limitation upon the power of the husband to alienate community real property.

While the statutes of California are in some respects similar to the community property laws of the other community property States, the rule established by the highest courts of that State is that during coveture the wife has no vested interest in the community property, her interest therein being a mere expectancy.

In *Spreckles v. Spreckles*, 116 Cal. 339 (1897), the supreme court of that State held that prior to the amendment of 1891 to sec. 172 of the Civil Code, forbidding the husband to give away community property without consent of the wife in writing, the code vested in the husband all the elements of absolute ownership of the community property; that the wife's interest was a mere expectancy, and as to all the world except the wife, there was, prior to that amendment, no distinction between the community estate and the separate estate of the husband; and that the amendment could not be construed retroactively so as to deprive the husband of his vested right to dispose by gift of community property acquired prior to the amendment without the consent of the wife.

In 1905 California passed an inheritance tax law, and subsequently the question was raised whether a widow should be compelled to pay such tax on that one-half of the community property that she took on the death of her husband. In the Estate of Moffitt, 153 Cal. 359 (1908), the Supreme Court of California held that she did, since she had no vested interest in the community estate and took her one-half on the death of her husband as his heir.

This case was taken to the Supreme Court of the United States (*Moffitt v. Kelly*, 218 U. S. 400) where the judgment of the lower court was affirmed, the court laying down the rule that the nature and character of the right of the wife in community property for the purpose of taxation is a peculiarly local question, and the determination of the State court in regard thereto is not reviewable by the Su-

preme Court; and, further, that the law of California of 1905, taxing all property passing by will or intestacy, having been construed by the highest court of that State as applying to the wife's share of the community property, such tax is not in conflict with the contract, due process, or equal protection clauses of the Constitution.

Subsequently the inheritance tax law of California was amended to provide "that for the *purpose of this act*" the one-half of the community property which goes to the surviving wife on the death of her husband, under the provisions of section 1402 of the Civil Code, "shall not be deemed to pass to her as heir to her husband, but shall, for the purpose of this act, be deemed to go, pass, or be transferred to her for valuable and adequate consideration."

It is obvious that this language does not change the rule of community property in the State nor vest in the wife any interest thereto prior to the dissolution of the community; rather it emphasizes the existing rule that the wife has no vested interest in community property.

As to the effect of section 172a of the Civil Code, enacted in 1917, it is not to be presumed that the legislature intended by the enactment of same to make so revolutionary a change in the existing rule of property in California as to devest the husband of his ownership in the community property. As was said in *Spreckles v. Spreckles, supra,* "if a husband can not make a valid transfer of the property for the purpose of depriving his wife of it, that does not show a vested right in her;" and giving the fullest possible effect to the language, unless the wife had a vested interest by virtue of the law as it theretofore existed, which it must be conceded she did not, the operation of the amendment would necessarily be confined to community property acquired after May 23, 1917.

SUMMARY.

Summarizing, it appears that in all of the community-property States except California their own courts have held that the wife has, during the existence of the marriage relation, a vested interest in one-half of the community property. Her rights in the property of the community are perhaps most fully recognized in the State of Washington, where both spouses have testamentary disposition over one-half of the community property, and where in the absence of such disposition it descends to their issue, or, in the absence of issue, to the survivor; while the husband is manager of the community estate in Washington he may not sell, convey, or encumber real estate unless the wife join with him in the conveyance; and as was held in *Huyvaerts v. Roedtz, ante,* and *Schramm v. Steels, ante,* the separate debt of the husband can not be satisfied out of community property where it is not incurred in connection with the community business, nor for the benefit of the community.

In Idaho it is seen that the limitation upon the alienation of the community real property is the same as in Washington. But while the wife's earnings and the rents and profits of her separate estate are community property she is given the management and control of same. The Idaho rule governing the disposition of community property on the death of either spouse is, with minor variations, the same as that of Washington. In neither State is an inheritance tax payable on the one-half of the community that goes to the one spouse on the death of the other.

In Arizona the husband only may dispose of community personal property, but the wife must join him in deeds or mortgages affecting real estate, except unpatented mining claims. One-half of the community property is subject to the testamentary disposition of either spouse, and in absence of such disposition goes to his or her descendants; where

there is neither testamentary disposition nor descendants it is subject to distribution in the same manner as the separate property of the husband. On decree of divorce the court may divide the property as he sees fit, but in the absence of provision for the community property the parties from the date of the decree hold as tenants in common. The courts of Arizona hold that the wife is equal owner with her husband.

In Nevada, the husband has the entire management and control of the community property, except that the wife has entire control of her earnings when living separate from her husband. Upon her death the husband takes the whole community estate, except that where he has abandoned her without good cause she may by will dispose of half and in absence of such disposition it goes to her heirs, exclusive of her husband. On the death of the husband the wife takes half and the husband may dispose of the other half by will, or it goes to his surviving children; if there is no will and no children survive, the whole goes to the wife without administration, subject to certain provisos. On dissolution of community by divorce for any other ground than adultery or extreme cruelty, the community property must be equally divided between the parties. The wife pays no inheritance tax under the inheritance tax law of Nevada on her interest in community property, the courts holding that she takes not as heir but by a right vested in her at all times during marriage. It is to be noted that the constitution of Nevada recognizes the wife's interest in community property.

In New Mexico, while the husband is manager of the community estate, he may not transfer real property without a valuable consideration without the written consent of his wife; and under certain circumstances the wife may be substituted as manager; prior to 1915 he could not transfer community personal property except for a valuable consideration without her written consent; on dissolution of the

community by the death of the wife the husband takes all except such portion as may have been set aside to the wife by judicial decree, which portion goes to her heirs unless she has disposed of same by will; on death of the husband one-half goes to the wife and the other half is subject to testamentary disposition by the husband. If he makes no will one-fourth of his one-half goes to the wife and the remainder to the children. On separation either may petition for division of community property and after divorce continue to hold as tenants in common where no disposition has been made in the divorce decree. New Mexico has no State inheritance tax act.

In Louisiana the community property comprehends all property acquired during the marriage by either husband or wife except that acquired with separate funds or by inheritance or particular donation, and excepting the earnings of the wife when she is living separate from her husband; the husband is manager of the community but he may not convey community immovables by gratuitous title, and can not dispose of movables in fraud of the wife; either spouse may dispose of one-half the community property by will and the laws governing the descent of such property in the absence of testamentary disposition apply equally to both spouses, the survivor taking the deceased spouse's half by inheritance when there is no will, and neither father, mother, or descendants. As heretofore stated, the survivor pays no inheritance tax on his or her one-half of the community property but does pay on that part inherited from the deceased spouse.

In California the wife has no power of testamentary disposition of community property except of such as may have been set aside to her by judicial decree; she takes one-half as heir on the death of the husband; but on the death of the wife the entire community property belongs to the husband without administration. The California courts have held that under the law as it stood prior to 1917 the wife

had no vested interest in community property prior to the dissolution of the marriage; the amendment to the inheritance tax act being limited to the purposes of that act could not have had the effect of vesting an interest in her, and had the addition of Sec. 172a had that effect any amendment of the inheritance tax act would have been unnecessary to exempt her one-half from taxation thereunder. In the case of *Blum v. Wardell*, now pending before the Circuit Court of Appeals of the Ninth Circuit, on appeal from the District Court of the Northern District of California, the application of the Federal Estate Tax Act of 1916 is under consideration.

As appears from my opinion of September 10, 1920, in Texas the control of community property is divided between the husband and wife; in that State on the death of either spouse without issue the survivor takes the whole and where there is issue, takes one-half, the other half going to said issue or their descendants. Under the State inheritance tax law the wife pays no tax on her half of the community property.

In *Warburton v. White*, 176 U. S. 484, 496, the principle was enunciated that where State decisions have interpreted State laws governing property or controlling relations that are essentially of a domestic and State nature the United States Supreme Court will follow the State decisions, if possible to do so, in the discharge of its duties. Also in *De Vaughn v. Hutchinson*, 165 U. S. 566, 570, it was held that to the law of the State in which property is situated we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances. In *United States v. Crosby*, 7 Cranch 115, it was held that the title to land can be acquired and lost only in the manner prescribed by the law of the place where same is situated.

In arriving at an answer to the questions propounded by you we are called upon to determine the

rules of property in the community property States; we have, therefore, pursuant to the rules of the above cases, adopted the rules laid down by the highest courts of the various States. There remains to be determined the application thereto, of the income and estate tax provisions of Federal statutes. In my previous opinion it was stated that since in Texas the ownership in one-half of all community property vests in each spouse, whatever is income to the community is income to both. This conclusion applies, therefore, to all States in which community property is held to be vested equally in both spouses.

Section 201 of the Revenue Act of 1916 and sec. 401 of that of 1918 impose a tax "upon the transfer of the net estate of every decedent" dying after the passage thereof, to be determined as is set forth in the sections following, which are:

Revenue Act of 1918.

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

* * * * * *

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent.

Subdivisions (a) and (e) of section 202 of the Revenue Act of 1916 are identical with subdivisions (a) and (d) of section 402 of the Revenue Act of 1918, quoted above.

While the community estate of husband and wife has not in the strictest sense all the incidents of a joint estate or an estate in the entirety, as they were known at common law, I am convinced that the community estate is for all practical purposes within

the language of subdivision (d) of section 402, there being deductible therefrom, in arriving at the net estate of decedent, the one-half interest of the surviving spouse, which may be shown to have originally belonged to such person and never to have belonged to the decedent.

And even though it should be held that the community estate is not a "joint estate" or an "estate in the entirety" within the meaning of the Revenue Acts, the one-half interest of the deceased spouse in community property would still be subject to tax under the language of subdivision (a) above.

My answers to your questions are therefore:

(1) That in Washington, Arizona, Idaho, New Mexico, Louisiana, and Nevada the husband and wife domiciled therein, in rendering separate income tax returns, may each report as gross income one-half of the income which under the laws of the respective States becomes, simultaneously with its receipt, community property.

(2) In the States mentioned, in answer to question one, there should be included in gross estate, in computing the estate tax of a deceased spouse, one-half only of the community property of husband and wife domiciled therein.

(3) Neither of the above answers is based upon a statute enacted subsequent to March 1, 1913.

(4) My answers to these questions apply under income and estate tax Acts prior to the Revenue Act of 1918.

Respectfully,

(Signed) A. MITCHELL PALMER,
Attorney General.

Hon. DAVID F. HOUSTON,
Secretary of the Treasury,
Washington, D. C.

Opinion of Acting Attorney General Mitchell dated July 16, 1927.

DEPARTMENT OF JUSTICE,
July 16, 1927.

Sir: Under date of February 3, 1926, you asked me to reconsider two opinions of the Attorney General, the first dated September 10, 1920 (32 Op. 298), and the second dated February 26, 1921 (32 Op. 435). These opinions deal with the nature of the wife's interest in community income under the systems prevailing in the States of Texas, Washington, Arizona, Idaho, New Mexico, Nevada, and Louisiana, a list which includes all of the States excepting California in which any form of the community property system is in force. In the earlier opinion it was held that in Texas the wife had such an interest in the community income as to entitle her to return half of it as her income under the Revenue Act of 1918. In the opinion of February 26, 1921, a similar conclusion was reached respecting the wife's interest in the community income under the systems prevailing in the other states mentioned.

Your request for reconsideration followed the decision of the Supreme Court of the United States in the case of *United States v. Robbins*, 269 U. S. 315, decided January 4, 1926, in which it was held that the wife's interest in the community income under the system in force in California in 1918 was not substantial enough during the existence of the community to entitle her to separately return half of it as her income under the Revenue Act of 1918.

The questions involved are not matters of construction of the Revenue Acts of the United States, but involve the nature of the wife's interest in the community income. The Revenue Acts of the United States have been so drafted as to require the husband to return and pay income taxes upon the community income if that income belongs to him, and to prevent

the wife from returning a share of the community income as her own unless that share belongs to her. Neither the opinions of the Attorney General upon this subject nor the rulings of the Treasury Department have been based on any interpretation of the Acts of Congress. The nature and extent of a wife's interest in community income in any of these States is to be determined from the statutes and decisions of the State. In determining the nature of an interest in community income created by State law, it is necessary for the Federal courts to accept the decisions of the State courts construing the statutes creating the interest and to determine from the statutes and decisions of the State courts the intrinsic nature of that interest. While the adjectives used by State courts in an effort to describe the nature of the wife's interest in community income are not necessarily controlling on the Federal courts as to the extent of the wife's interest, decisions of the State courts holding what rights of a proprietary nature the wife may exercise in respect of community income are binding on the Federal courts. I have made these observations to show that it has been necessary, as the result of your request, to make a very exhaustive examination of the statutes and decisions of the seven States mentioned relating to community property. This laborious task was undertaken with the expectation of reaching conclusions on the law which might be expressed in response to your request for reconsideration, but the result has led me to the conclusion, which possibly I might have anticipated at the outset, that the problems presented can not be settled by any opinion of the Attorney General and that the situation makes it inappropriate under established precedents for me to express any conclusions. My predecessors have refrained from rendering opinions on questions pending in the courts for decision and have frequently refrained from expressing opinions where it is evident the matter is

bound to be the subject of judicial decision in the immediate future.

The decision in the case of *United States v. Robbins, supra,* dealing with the California system, does not necessarily dispose of the problem in the other States in which some forms of the community property system are in effect. In that case the ultimate inquiry was as to the extent to which, under the statutes and decisions of California, the wife could exercise rights of ownership over a share of the community income. The same problem arises in each of the other States above mentioned. There are very substantial differences between the so-called community property systems in these various States. No two of them are just alike. Some resemble very closely the system in California dealt with in the *Robbins case,* but in other States the systems differ very considerably from the California system. In some of the States the extent of the wife's proprietary interest or ownership in community income derived from one source differs from that in community income derived from other sources. While I have acquired opinions on the subject as result of the examination of the statutes and decisions of these States and the proper answer to the questions involved may be more evident as to some of the States than as to others, I believe for the reasons stated that it would be inappropriate and ineffective for me to deal with the subject in an opinion with a view to having your regulations and methods of dealing with community income changed. The answers to the questions involved are not so obvious as to make it clear what conclusions the courts may reach. To overturn by administrative actions and in reliance on an opinion of the Attorney General the method of dealing with community income which has prevailed in seven States, with the possibility that, in the end, the courts would not agree with our views, would produce the utmost confusion and create an intolerable situation.

On the other hand, so long as the former opinions referred to are allowed to stand, they interfere with your taking any steps to have these questions determined in the courts, and it must be admitted that the decision in *United States v. Robbins* has raised very substantial doubt as to the soundness of the two opinions.

The questions involved are not such as may appropriately be set at rest by congressional action. As the nature and extent of a wife's interest in community income are matters determined by the laws of the States, Congress may not by any enactment change the nature of the wife's interest; and as the problem involved in not one of construction of the Revenue Acts of the United States, the rule that reenactment of a statute after an administrative construction of it is legislative adoption of the construction, has no application to this case. By section 1212 of the Revenue Act of 1926 Congress has indicated an intention to set these questions at rest, to some extent at least, for the period before January 1, 1925, but that enactment, the effect of which it is not necessary for me to consider now, is only in the nature of a statute of limitations and the limiting of its effect to the period before January 1, 1925, emphasizes the existence of the problem for the period after that date. If it be the fact that in some or all of these States in which a community property system prevails, the wife has no real ownership in community income during the existence of the community, an attempt by Congress to allow wives in those States to return part of the community income as their own, while in other States not having a community property system wives are not allowed to return any part of their husband's income, would raise serious questions under the uniformity provisions in the Constitution of the United States. The problems involved are therefore essentially of a kind which should be settled by the courts and which can not be set at rest in any other way.

For these reasons I feel constrained to, and do now, withdraw the two opinions referred to in order to leave you free, as has been done in similar situations, to arange for test cases in the courts or otherwise deal with the matter as you may think proper.

Respectfully submitted,

WILLIAM D. MITCHELL.
Acting Attorney General.

To the Secretary of the Treasury.